C1.12/3:3/7

SOCIOLOGY & ECONOMICS
DETROIT PUBLIC LIBRARY

olume 3, No. 7, Pages 1768 to 2034, March 28 - April 8, 1988.

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

The contents of this document are subject to correction by means of an erratum appearing at a future date in the **FCC Record**. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the **FCC Record** should include the volume number, page number, and year. See 47 C.F.R.§1.14. Earlier Commission documents may continue to be cited to the **FCC Reports**.

Citation Form: 2 FCC Rcd 1 (1987)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

Detroit Public Library

MAY 1 1 1988

Depository Document

Federal Communications Commission Record

Volume 3
Issue 7

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities.....viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions..... xii

Decisions, Reports, Memorandum Opinions, Orders, and
Other Selected Material.....1768

Federal Communications Commission Record

Table of Cases
Volume 3
Issue 7

Case Name	Page
AT&T - 900 Service	1888
AT&T Communications	1885
AT&T Cost Allocation Manual	1786
Access to Telecommunications Equipment and Services	1982
Amendment of Part 73	1820
Amendment of Part 90	1838
Amendment of Parts 73 and 74	1974
American Telephone and Telegraph Company	1805
Annual 1985 Access Tariff Filings - Phase II	1973
Arkansas Educational Television Commission	1923
Axell, Wade	2008
BRONWYN - WSQ 7049	1860
Bell Atlantic and US West	1785
Bell Atlantic, Bellsouth, and Nynex - Cost Allocation Manuals	1871
Bellsouth's Comparably Efficient Interconnection Plan	1948
Bott Communications, Inc.	1883
Broadcast Stations Serving the State of Florida	1930
Cablevision Service Co., Inc.	1832
Carolina Christian Broadcasting, Inc.	1907
Catawba Valley Broadcasting Company, Inc.	1913
Celina Broadcasting	2029
Cencom of Missouri	1834
Centel Corporation	1784
City of Tucson	1979
Communications Satellite Corporation	1884
Comsat Earth Stations, Inc.	1803
Continental Cablevision of St. Louis County, Inc.	1835
Continental Cablevision of Virginia, Inc.	1836
Continental Cablevision of Virginia, Inc.	1837
Corpus Christi Cellular Telephone Co.	1889
Crook, Linda	1867
Davis, Roy	2017
Daytona Beach Community College	1951
Dean - Thomas Communications	2030
Dubuque T.V. Limited Partnership	1886
East Texas Television Network, Inc.	1783
Equipment Authorization Procedures	1904
Family Stations, Inc.	2021
Fee Decisions of the Managing Director	1882
Formal Complaints against Common Carriers	1806
Froggy Bottom Television	2006
GALI Communications, Inc.	1981

Case Name	Page
GTE Mobilnet of Tampa Incorporated	2012
GTE Spacenet Corporation	1801
Giacone, Leonard J.	2025
Greater Portland Broadcasting Corporation	1953
Hawaiian Telephone Co.	1800
Henderson, Roy E.	2010
Holloman, Terry L.	2032
Home Box Office, Inc.	1872
Hudgins, Chris C.	1828
International Relay, Inc.	1771
Jazzo, Frank R.	1782
Jensen, Rex K.	1779
Jones, Theodore M.	1997
KCCO-KRLG, Inc.	1776
Michigan Bell Telephone Company	1980
Milledgeville Mobilefone, Inc.	1998
Miller, Ernest C.	2023
Missouri Cable Television Association	1833
NECA Administrative Expenses	1950
National Capital Christian Broadcasting, Inc.	1919
Parker, Sam	1956
Petition to Amend Section 97.113(d)(2)	1859
Record Retention Periods	1768
Sanyo Manufacturing Corporation	1864
Silver Star Communications - Albany, Inc.	1958
Simmons Communications of Delaware-Maryland	1831
Southwestern Bell	1949
T-Com, Inc. and American Paging, Inc.	1772
TPI Transmission Services, Inc.	1829
Table of Allotments, FM, Bastrop, LA	1944
Table of Allotments, FM, Biddeford, ME	1898
Table of Allotments, FM, Bisbee, AZ	1880
Table of Allotments, FM, Bridgeport, NY	1946
Table of Allotments, FM, Cape Coral, FL	1877
Table of Allotments, FM, Chillicothe, OH	1903
Table of Allotments, FM, Fort Mohave, Arizona	2004
Table of Allotments, FM, Frostburg and Grantsville, MD	1874
Table of Allotments, FM, Georgetown, DE	1900
Table of Allotments, FM, Georgetown, SC	1896
Table of Allotments, FM, Grover City, CA	1936
Table of Allotments, FM, Kailua-Kona, HI	1938
Table of Allotments, FM, Lebanon, TN	1942
Table of Allotments, FM, Lompoc and Orcutt, California	1995
Table of Allotments, FM, Mason City and Iowa City, Iowa	2002
Table of Allotments, FM, Mesquite, NV	1873
Table of Allotments, FM, Mt. Laguna, CA	1876

Case Name	Page
Table of Allotments, FM, Newberry, MI	1878
Table of Allotments, FM, Old Forge, NY	2000
Table of Allotments, FM, Paradise, CA	1894
Table of Allotments, FM, Pella, IA	1902
Table of Allotments, FM, Philpot, KY	1940
Table of Allotments, FM, Spring Grove,MN and Mason City, IA	1905
Table of Allotments, FM, Stuart, FL	1901
Table of Allotments, TV, Yosemite Valley, CA	1881
Technical Parameters for FM Allocation Rules	1978
Trax Broadcasting	2014
Turner Broadcasting and Communications System	2019
US West, Pacific Bell, Nevada Bell-Cost Allocation Manuals	1830
VHF marine channel 13	1861
WGRI Radio Incorporated	1777
Wodlinger, Mark L.	1870

Table of Cases by Delegated Authority and FCC Number
Volume 3
Issue 7

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 88-0308	2032	DA 88-0398	1940
DA 88-0321	2030	DA 88-0399	1942
DA 88-0322	2029	DA 88-0400	1944
DA 88-0324	2025	DA 88-0401	1946
DA 88-0325	2023	DA 88-0402	2000
DA 88-0326	2021	DA 88-0403	2002
DA 88-0330	1886	DA 88-0404	2004
DA 88-0339	1873	DA 88-0405	1800
DA 88-0342	2019	DA 88-0406	1801
DA 88-0346	1973	DA 88-0407	1803
DA 88-0353	2017	DA 88-0409	1829
DA 88-0354	2014	DA 88-0410	1830
DA 88-0362	1884	DA 88-0411	1831
DA 88-0366	1905	DA 88-0412	1832
DA 88-0368	1871	DA 88-0413	1833
DA 88-0369	1885	DA 88-0414	1834
DA 88-0371	1805	DA 88-0415	1835
DA 88-0372	1859	DA 88-0416	1836
DA 88-0373	1784	DA 88-0417	1837
DA 88-0374	1785	DA 88-0419	1860
DA 88-0376	2012	DA 88-0420	1888
DA 88-0377	1786	DA 88-0421	1872
DA 88-0378	1771	DA 88-0422	1883
DA 88-0379	1772	DA 88-0426	1948
DA 88-0380	2010	DA 88-0427	1882
DA 88-0381	2008	DA 88-0428	1889
DA 88-0382	1877	DA 88-0430	1904
DA 88-0383	1878	DA 88-0431	2006
DA 88-0384	1881	DA 88-0432	1949
DA 88-0385	1880	DA 88-0433	1980
DA 88-0386	1874	DA 88-0434	1998
DA 88-0387	1876	DA 88-0435	1950
DA 88-0388	1900	DA 88-0436	1979
DA 88-0389	1901	DA 88-0440	1978
DA 88-0390	1902	DA 88-0444	1997
DA 88-0391	1903	DA 88-0446	1995
DA 88-0392	1894	FCC 88-0064	1974
DA 88-0393	1896	FCC 88-0069	1838
DA 88-0394	1898	FCC 88-0073	1820
DA 88-0395	1936	FCC 88-0074	1907
DA 88-0397	1938	FCC 88-0075	1913

Delegated Authority or FCC Number	Page
FCC 88-0076	1919
FCC 88-0077	1923
FCC 88-0078	1930
FCC 88-0091	1806
FCC 88-0094	1782
FCC 88-0098	1768
FCC 88-0099	1861
FCC 88-0104	1777
FCC 88-0105	1783
FCC 88-0107	1951
FCC 88-0111	1828
FCC 88-0112	1953
FCC 88-0113	1779
FCC 88-0114	1956
FCC 88-0115	1776
FCC 88-0117	1864
FCC 88-0123	1982
FCC 88D-010	1958
FCC 88R-019	1867
FCC 88R-020	1870
FCC 88R-021	1981

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 3
Issue 7

Docket Number			Page
CC	Dkt.No.86 -	498	1806
CC	Dkt.No.87 -	2	1950
CC	Dkt.No.87 -	124	1982
GEN	Dkt.No.87 -	552	1904
MM	Dkt.No.82 -	664	1880
MM	Dkt.No.85 -	335	1876
MM	Dkt.No.86 -	109	1870
MM	Dkt.No.86 -	143	1867
MM	Dkt.No.86 -	144	1978
MM	Dkt.No.86 -	155	1958
MM	Dkt.No.86 -	180	1981
MM	Dkt.No.86 -	362	1883
MM	Dkt.No.86 -	384	1995
MM	Dkt.No.86 -	454	1874
MM	Dkt.No.86 -	488	1894
MM	Dkt.No.86 -	507	1877
MM	Dkt.No.86 -	518	1881
MM	Dkt.No.87 -	94	1873
MM	Dkt.No.87 -	100	1768
MM	Dkt.No.87 -	121	1820
MM	Dkt.No.87 -	202	1896
MM	Dkt.No.87 -	230	1900
MM	Dkt.No.87 -	262	1878
MM	Dkt.No.87 -	263	1898
MM	Dkt.No.87 -	365	1902
MM	Dkt.No.87 -	374	1901
MM	Dkt.No.87 -	408	1903
MM	Dkt.No.88 -	113	2030
MM	Dkt.No.88 -	115	2021
MM	Dkt.No.88 -	116	2025
MM	Dkt.No.88 -	117	2023
MM	Dkt.No.88 -	119	2014
MM	Dkt.No.88 -	120	2008
MM	Dkt.No.88 -	121	2029
MM	Dkt.No.88 -	122	2017
MM	Dkt.No.88 -	123	1936
MM	Dkt.No.88 -	125	1938
MM	Dkt.No.88 -	126	1940
MM	Dkt.No.88 -	127	1942
MM	Dkt.No.88 -	128	1944
MM	Dkt.No.88 -	129	1946
MM	Dkt.No.88 -	130	2000
MM	Dkt.No.88 -	132	2004
MM	Dkt.No.88 -	133	2019
MM	Dkt.No.88 -	134	2006
MM	Dkt.No.88 -	137	2010
MM	Dkt.No.88 -	141	1905
PR	Dkt.No.87 -	275	1861

Table of Cases by Rulemaking Number
Volume 3
Issue 7

Rulemaking Number	Page
RM - 4181	1880
RM - 4853	1876
RM - 5223	1995
RM - 5476	1995
RM - 5499	1874
RM - 5501	1877
RM - 5537	1894
RM - 5584	1873
RM - 5621	1768
RM - 5659	1881
RM - 5667	1995
RM - 5676	1898
RM - 5701	1896
RM - 5707	1900
RM - 5726	1901
RM - 5727	1878
RM - 5777	1902
RM - 5824	1942
RM - 5830	1874
RM - 5849	2002
RM - 5939	1936
RM - 5949	2002
RM - 6004	1903
RM - 6015	1820
RM - 6016	2004
RM - 6030	1905
RM - 6140	1938
RM - 6142	1940
RM - 6168	1944
RM - 6195	2000
RM - 6199	1946

Table of Cases by City
Volume 3
Issue 7

City/State	Page	City/State	Page
Bastrop, LA	1944	Lawton, OK	1776
Baton Rouge, LA	1923	Lebanon, TN	1942
Biddeford, ME	1898	Little Rock, LA	1923
Billings, MT	1870	Lompoc, CA	1995
Bisbee, AZ	1880	Macon, GA	1998
Bloomington-Normal, IL	2032	Manassas, VA	1919
Bridgeport, NY	1946	Marquette, MI	2019
Bridgewater, VA	2030	Mason City, IA	2002
Cape Coral, FL	1877	Mason City, IA	1905
Celina, TN	2029	Mesquite, NV	1873
Chapel Hill, NC	1913	Mt. Laguna, CA	1876
Charlottesville, VA	1997	Murray, KY	1956
Chillicothe, OH	1903	Myrtle Beach, SC	1907
Columbia, SC	1907	Newberry, MI	1878
Cordele, GA	1958	Northford, CT	1772
Cortez, CO	1779	Old Forge, NY	2000
Danville, VA	2006	Orcutt, CA	1995
Deland, FL	1951	Oro Valley, AR	2010
Denver, CO	1981	Paradise, CA	1894
Dubuque, IA	1886	Paris, TX	1783
East Ridge, TN	2017	Pella, IA	1902
Fayetteville, NC	1907	Philpot, KY	1940
Fort Mohave, AR	2004	Quincy, IL	1867
Frostburg, MD	1874	Shreveport, LA	1923
Georgetown, SC	1896	Silver Spring, FL	2014
Georgetown, DE	1900	Spring Grove, MN	1905
Grantsville, MD	1874	Springfield, MA	1772
Grass Valley, CA	2008	Stuart, FL	1901
Greenville, SC	1907	Tampa, FL	2012
Griffin, GA	1777	Tucson, AZ	1979
Grover City, CA	1936	Vancouver, WA	1953
Hartford, CT	1772	Vicksburg, MS	2025
Hastings, NE	1883	Washington, DC	1782
Hickory, NC	1913	Wauseon, OH	2023
Iowa City, IA	2002	Yosemite Valley, CA	1881
Kailua-Kona, HI	1938	Youngstown, OH	2021

Subject Index
Volume 3
Issue 7

Subject	Page
Access Charges	
Exchange Carrier Association	
Adjudication	
Limited partnership	1958
Orders or Notices	
Lottery to select licensee	1958
New service v. expansion of existing service	2019, 2006
Programming, specialized	2019, 2006
Reopening of record	2019, 2006
Amateur Radio Service (ARS)	
ARS - Transmissions and practices, prohibited	
Broadcasting and related activities prohibited	1859
Broadcast Radio Services - General Rules	
Applications	
Facilities, applications to modify/change control of unbuilt	1783
Changes, renewals in existing stations	
Renewal of license	1953
Construction permits	
Extension/replacement, application for	1783
Modification of permit, application for	1956
Licenses and permits	
Multiple ownership of broadcast stations in the same service	1956
Program contents	
Lottery information	1776
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	1873, 1876, 1878, 1880, 1898, 1900, 1903, 1936, 1942, 1944, 2002, 2004,
Distances between stations, minimum	1978
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	1881, 1974

Subject	Page
Cable Television Service	
Network nonduplication protection	
Signals, priority of	1886
Commission Organization	
General public information and inspection of records	
Inspection of records not routinely available, request for	1828
Common Carriers: Miscellaneous Rules	
Common carrier, miscellaneous rules relating to	
Allocation of costs to regulated or non-regulated costs	1871, 1784,
Communications Act of 1934	
	1772, 1776,
Accounts, records, memoranda-depreciation charges	1871, 1784, 1830
Construction permits	1801
Extension of lines	1800, 1801,
Services and charges	1888
Common Carrier	
Pole Attachment Regulation	1831, 1832, 1835, 1836,
Maritime Services	
Frequencies - radiotelephony	
Private communications frequencies	1861
Passenger, boats, small - Rp	
Rp installation, requirements for	1860
Safety watches	
Ship: Great Lakes Radio Agreement	1861
Operational-Fixed Microwave Service, Private	
Technical standards	
Power and frequency bands, table of	1979
Practice and Procedure	
Information, general	
Suspend/amend/waive rules at any time, Commission may	1949
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	1776
Reconsideration of a final FCC action, petition for	1870

Subject	Page
Private Land Mobile Radio Services	
Licensing/use of frequencies in 806-821, 851-866 MHz bands	
Applications, limitations on amendments of	1838
Applications, processing of	1838
Eligible for licenses, persons	1838
Loading requirements for trunked systems	1838
Trunked systems (816-821/861-866) MHz bands prior to 9.1.87	
Rules in effect until 9.1.87	1838
Public Mobile Service	
Applications and licenses-filing requirements	
Defective applications	1998
Requirements	1889
Applications and licenses-processing	
Construction, time period allowed for	1772
Mutually exclusive applications	1998
Opposition to applications	1889
Transfer/assignment of applications, considerations involving	1889
Domestic public cellular radio telecommunications service	
Applications, contents and form of	2032
Financial qualifications	1889, 2012
Radio Frequency Devices	
Radio receivers	
Television receivers to be capable of receiving all channels	1864
Special Broadcast Services	
Instructional TV fixed service	
Frequency assignments available, table of	1951
Services permissible and educational purposes	1951
Statutory Citations Other than Communications	
Public information; agency rules, opinions, orders	1828
Telecommunications Companies: Classes A and B	
	1949
Nonregulated activities	1871, 1784, 1830
Regulated accounts	1871, 1784, 1830
Transactions with affiliates	1871, 1784, 1830

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.461 Requests for Inspection of Records	1828
001.003 Suspension, Amendments, or Waivers	1949
001.046 Extension of Time	1973
001.073 Satisfaction of complaints: damages	1829
001.106 Petition for Reconsideration, Denied	1870
001.106 Petition for Reconsideration, Granted	1867
001.115 Application for Review of Action Taken Per Delegated	1776
001.115 Application for Review of Action Taken Per Delegated	1779
001.145 Pleadings filing periods	1997
001.276 Appeal and review of I.D.	1883
001.720 General pleading requirements*	1806
001.773 Petition for Suspension of New Tariff Filing	1884
001.773 Petition to Reject New Tariff Filing	1885
001.773 Petitions for suspension or rejection of new tariff	1805
015.065 All-Channel Television broadcast reception: General	1864
022.013 General application requirements	1889
022.020 Defective applications	1998
022.030 Opposition to applications	1889
022.031 Mutually exclusive applications	1998
022.040 Considerations involving transfer or assignment	1889
022.043 Period of construction	1772
022.903 Cellular System Service Areas	2012
022.913(b) forms of application	2032
022.913(c) Copies	2032
022.917 Demonstation of Financial qualifications	2012
022.917 Demonstration of financial qualifications	1889
032.014 Regulated Accounts	1784
032.014 Regulated Accounts	1785
032.014 Regulated Accounts	1786
032.014 Regulated Accounts	1830
032.014 Regulated Accounts	1871
032.018 Waivers	1949
032.023 Nonregulated activities	1784
032.023 Nonregulated activities	1785
032.023 Nonregulated activities	1786
032.023 Nonregulated activities	1830
032.023 Nonregulated activities	1871
032.027 Transactions with affiliates	1784
032.027 Transactions with affiliates	1785
032.027 Transactions with affiliates	1786
032.027 Transactions with affiliates	1830
032.027 Transactions with affiliates	1871
032.3000 Instructions for Balance Sheet Accounts Dep. & Amor	1980
032.4240 Reacquired debt	1949
061.038 Supporting Information for Letters of Transmittal	1885
061.038 Supporting Information for Letters of Transmittal	1884
063.001 Contents of Applications	1800
063.001 Contents of Applications	1801
063.001 Contents of Applications	1803
064.901 Allocation of Costs	1784

064.901 Allocation of Costs 1785
064.901 Allocation of Costs 1786
064.901 Allocation of Costs 1830
064.901 Allocation of Costs 1871
068.004 Hearing Aid Compatible Telephones 1982
068.112 Hearing-aid compatibility 1982
068.224 Notice of Hearing-aid compatibility 1982
068.316 Hearing-aid compatibility: technical standards 1982
069.603 NECA Administrative Expenses 1950
073.1211 Broadcast of Lottery Information 1776
073.1211 Broadcast of Lottery Information 1779
073.1740 Minimum Operating Schedule 1777
073.1750 Discontinuance of Operation 1777
073.202 FM Table of Allotments 1874
073.202 FM Table of Allotments 1877
073.202 FM Table of Allotments 1878
073.202 FM Table of Allotments 1894
073.202 FM Table of Allotments 1898
073.202 FM Table of Allotments 1900
073.202 FM Table of Allotments 1901
073.202 FM Table of Allotments 1905
073.202 FM Table of Allotments 1936
073.202 FM Table of Allotments 1938
073.202 FM Table of Allotments 1940
073.202 FM Table of Allotments 1942
073.202 FM Table of Allotments 1944
073.202 FM Table of Allotments 1946
073.202 FM Table of Allotments 1995
073.202 FM Table of Allotments 2000
073.202 FM Table of Allotments 2004
073.202, FM Table of Allotments 1873
073.202, FM Table of Allotments 1896
073.202, FM Table of Allotments 1902
073.202, FM Table of Allotments 1903
073.202, FM Table of Allotments 2002
073.207 Minimum distance separation between stations. 1978
073.315 FM transmitter location 1820
073.316 FM antenna systems 1820
073.3525 Settlement Agreement, Granted 1981
073.3533 Application for Construction Permit or Modification 1956
073.3534 Application for extension of construction permit or 1783
073.3535 Application to modify authorized but unbuilt facili 1783
073.3539(c) Application for renewal of license 1953
073.3555 Multiple Ownership 1956
073.3555 Multiple ownership 1782
073.504 Noncommercial Educational FM Table of Allotments 1876
073.504 Noncommercial Educational FM Table of Allotments 1880
073.606 TV Table of Allotments 1881
073.606 Table of assignments 1974
074.902 Frequency assignments. 1951
074.931 Purpose and permissible service. 1951
076.092 Stations entitled to network program nonduplication 1886
080.308 Watch required by the Great Lakes Radio Agreement 1861
080.373 Private communications frequencies 1861

090.350 Scope. 1838
090.603 Eligibility. 1838
090.609 Special limitations on amendment of applications for 1838
090.611 Processing of applications. 1838
090.631 Trunked systems loading, construction and authorizat 1838
094.073 Power limitations. 1979
097.113 Broadcasting and broadcast related activities prohi 1859
300.154 Provision relating to the Commission 1982
300.201(a) Services and Charges 1888
300.214 Extension of Lines 1771
300.214 Extension of Lines 1800
300.214 Extension of Lines 1801
300.214 Extension of Lines 1803
300.220 Accounts, Records, and Memoranda; Depreciation Charg 1784
300.220 Accounts, Records, and Memoranda; Depreciation Charg 1785
300.220 Accounts, Records, and Memoranda; Depreciation Charg 1786
300.220 Accounts, Records, and Memoranda; Depreciation Charg 1830
300.220 Accounts, Records, and Memoranda; Depreciation Charg 1871
300.224 Regulation of pole attachments 1831
300.224 Regulation of pole attachments 1832
300.224 Regulation of pole attachments 1833
300.224 Regulation of pole attachments 1835
300.224 Regulation of pole attachments 1836
300.224 Regulation of pole attachments 1837
300.224 Regulation of pole attachments 1834
300.303(s) General Powers of Commission 1864
300.312 Administrative Sanctions 1777
300.316 modification of License 1872
300.319 Construction Permits 1801
300.503 Forfeiture 1776
300.503 Forfeitures in Cases of Rebates and Offsets 1779
300.503 Forfeitures in cases of rebates and offsets 1772
400.05552 Public Information 1828
400.181304 Broadcasting Lottery Information 1779
400.181307 State-conducted Lotteries 1779
500.095 - Character qualifications 1958
500.100 - Abuse of process 1958
500.112 Air Hazard 2006
500.112 Air Hazard 2019
500.140 Comparative 2006
500.140 Comparative 2019
500.150 Ultimate 2006
500.150 Ultimate 2019
500.3125 Misrepresentation and lack of candor 1867
Computer III Requirements 1948
NPRM, FM B/C STAS. (Bridgeport, NY), DA 88-401 1946
NPRM, FM B/C STAS. (Old Forge, NY), DA 88-402 2000
Part 73 Radio Broadcast Services 1904
Part 74 Experimental, Auxiliary, and Special Broadcast 1904
Part 78 Cable Television Relay Service 1904
Radiotelephone installation. 1860
(David and Joyce Goff d/b/a Celina Bdcstg)(Celina, Tennessee 2029
(Ernest C. Miller)(Wauseon, Ohio) 2023
(Family Stations, Inc.)(Youngstown, Ohio) 2021

(Leonard James Giacone)(Vicksburg, Mississippi) 2025
(Robert L. Dean & Charles Thomas, Sr., etc.) Bridgewater 2030
(Roy Davis)(East Ridge, Tennessee) 2017
(Roy E. Henderson d/b/a Pueblo etc.)(Oro Valley, Arizona) 2010
(Trax Broadcasting)(Silver Springs, Florida) 2014
(Wade Axell)(Grass Valley, California) 2008

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-100

In the Matter of

Amendment of Sections 73.3526(e)(2) and 73.3527(e)(2) of the Commission's Rules to Shorten the Record Retention Periods for Public File Materials — RM-5621

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1988; Released: April 7, 1988

By the Commission:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 2498 (1987) proposing to amend Sections 73.3526(e)(2) and 73.3527(e)(2) of the Commission's Rules to shorten the period of time during which licensees of broadcast stations must retain applications and related material in their public files.

2. In response to the *Notice*, comments were filed by the law firm of Fletcher, Heald and Hildreth (FHH) on behalf of its television and radio broadcast clients; the North Carolina Association of Broadcasters (NCAB); the National Association of Broadcasters (NAB); CBS, Inc. (CBS) and Cox Enterprises, Inc. (COX).

BACKGROUND

3. Section 73.3526(e) of the Commission's Rules provides that the licensee of a commercial broadcast station must retain applications and related material placed in the public file for a period of seven years from the date of application or until there is final FCC action on the second renewal application, whichever is later. Section 73.3527(e) of the rules imposes the same requirement on noncommercial educational stations. When this provision was originally adopted, license terms for television and radio stations were three years. Thus, licensees receiving regular renewals of license were required to keep the designated public file materials for the minimum retention period of seven years or until action on the second of two three year renewal applications.

4. The Omnibus Budget Reconciliation Act of 1981 extended the license terms for television and radio stations to five and seven years, respectively. Consequently, the provision in the rules relating to final action on the second renewal became significant, resulting in required retention periods for licenses receiving regular renewals of at least ten years for television stations and 14 years for radio stations.

5. The *Notice* stated that the present public file retention time period was intended to be of sufficient duration to give the public a chance to discern any trends in the licensee's performance, not because of some special need to retain records over two renewal periods. We noted that the congressional action had the unintended effect of making the retention period unnecessarily lengthy and imposing excessive administrative burdens on broadcast licensees without providing additional informational benefits for the public. We further stated that a shorter retention period is long enough to provide the public with a clear picture of station activity and that it would be administratively more efficient for required retention periods to coincide with the present renewal periods.

COMMENTS

6. All of the commenters in this proceeding support the Commission's proposal to modify its rules to reduce the length of time broadcasters must retain documents in their public files. FHH states that retention of materials for one renewal period, a period of 5 or 7 years, will provide the public with a sufficient volume of material to discern trends in station activity. At the same time, the administrative burden on television and radio stations will be significantly reduced.[1]

7. NCAB states that the revision would be consistent with the Paperwork Reduction Act of 1980. 44 U.S.C. 3501(1). The NAB believes that the proposal would restore the rule to its original intent of ensuring availability of material long enough for the public to have reasonable access and to be available during a station's renewal time. The NAB also agrees that the proposal would be consistent with the Paperwork Reduction Act and with the purpose of the Omnibus Budget Reconciliation Act.

8. CBS states that no reason exists to perpetuate the longer retention periods, which are unduly burdensome and an unintended consequence of extended license terms. Lastly, Cox states that the present retention periods require maintenance of excessive amounts of material which have little, if any regulatory function. Cox contends that the proposed modification would substantially ease the recordkeeping burden imposed on licensees without adversely affecting the Commission's ability to fullfill its regulatory responses or the public's ability to participate in the regulatory process.

DISCUSSION

9. As noted above, all commenters support our efforts to reduce the length of time broadcasters must retain documents in their public files. They agree that in light of the Omnibus Budget Reconciliation Act of 1981, the present two license term retention period is too long and imposes excessive administrative burdens on broadcast licenses. As we stated in the *Notice*, the substantial lengthening of the retention period was an inadvertent result of the 1981 extension of the license terms for television and radio, not the product of a policy decision that a longer retention period further advanced the public interest. Therefore, we find, the public interest concerns underlying the public file document period can be met by a shorter and less burdensome time period. Accordingly, we shall eliminate the minimum 7 year retention period and provide that the period of retention extend to one license term (5 years for television and 7 years for radio) or until grant of the first renewal application, whichever is later.

10. Pursuant to the authority contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended, IT IS ORDERED, That effective May 23, 1988,

Sections 73.3526(e)(2) and 73.3527 (e)(2) of the Commission's Rules amended as follows in the attached Appendix B.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. The Office of Management and Budget has approved the collections of information requirements contained in these rules. The OMB control numbers for these collections of information are 3060-0214 and 3060-0215.

13. The Final Regulatory Flexibility Analysis is set forth as Appendix A. The Secretary shall cause a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Paragraph 603 (a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Sections 601 *et seq.*, (1981).

14. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

Final Regulatory Flexibility Analysis

I. ***Need and Purpose of Rule***

In 1981, the public file retention period for broadcast stations was inadvertently lengthened when the three-year license terms for television and radio were increased to 5 and 7 years, respectively. This rule change will significantly reduce for the licensee much of the paperwork associated with the maintenance of public inspection files, while still providing the public access to enough information about the licensee to evaluate its performance.

II. ***Flexibility Issues Raised in the Comments***

All of the commenters in this proceeding support the Commission's proposal to modify its rules to reduce the length of time broadcasters must retain documents in their public files.

III. ***Significant Alternatives Considered But Not Adopted***

We are unaware of any significant alternatives that would minimize the impact of this proposed rule change on small entities and would be consistent with its stated objective. The rule would have no adverse impact on such entities but rather would greatly reduce the administrative burdens imposed by the unnecessarily long retention periods currently in place.

APPENDIX B

Part 73 of Title 47 of the CFR is amended as follows:

Part 73 - Radio Broadcast Service

1. The authority citation for Part 73 continues to read: Authority: 47 U.S.C. 154,303

2. Section 73.3526 is amended by revising paragraph (e)(2) as follows:

Section 73.3526 - Local public inspection file of commercial stations.

* * * * *

(e) * * *

(1) * * *

(2) The permittee or licensee shall maintain such a file so long as an authorization to operate the station is outstanding, and shall permit public inspection of the material as long as it is retained by the licensee even though the request for inspection is made after the conclusion of the required retention period specified in this paragraph. However, material which is voluntarily retained after the required retention time may be kept in a form and place convenient to the licensee and shall be made available to the inquiring party, in good faith after written request, at a time and place convenient to both the party and the licensee.

Applications and related material placed in the file shall be retained for a period beginning with the date that they are tendered for filing and ending with the expiration of one license term (five (5) years for television licensees or seven (7) years for radio licensees) or until the grant of the first renewal application of the television or radio broadcast license in question, whichever is later, with two exceptions:

(i) engineering material pertaining to a former mode of operation need not be retained longer than 3 years after a station commences operation under a new or modified mode; and

* * * * *

3. Section 73.3527 is amended by revising paragraph (e)(2) as follows:

Section 73.3527 - Local public inspection file of noncommercial educational stations.

* * * * *

(e) * * *

(1) * * *

(2) The permittee or licensee shall maintain such a file so long as an authorization to operate the station is outstanding, and shall permit public inspection of the material as long as it is retained by the licensee even though the request for inspection is made after the conclusion of the required retention period specified in this paragraph. However, material which is voluntarily retained after the required retention time may be kept in a form and place convenient to the licensee and shall be made available to the inquiring party, in good faith after written request, at a time and place convenient to both the party and the licensee.

Applications and related material placed in the file shall be retained for a period beginning with the date that they are tendered for filing and ending with the expiration of one license term (five (5) years for television licensees or seven (7) years for radio licensees) or until the grant of the first renewal application of the television or radio broadcast license in question, whichever is later, with two exceptions:

(i) engineering material pertaining to a former mode of operation need not be retained longer than 3 years after a station commences operation under a new or modified mode; and

* * * * *

FOOTNOTE

[1] FHH also proposed that during the course of this proceeding the Commission should review Section 73.3526(a)(6), which *inter alia*, requires public file retention of the 1974 FCC publication, "The Public and Broadcasting-A Procedure Manual." Specifically, FHH proposed that the Commission delete or update this requirement since much of the information in the manual is outdated. FHH also proposed that the Commission delete Sections 73.3526(a)(1) (citizen's agreements) and 73.3526(a)(7) (public letters). Since these sections were not included in the *Notice*, however, consideration of these provisions are outside the scope of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL RELAY, INC.,
Assignor,

and File No. ENF-87-17

TELECOM INTERNATIONAL
SERVICES, INC.,
Assignee.

Application for Consent to Assignment
of Authorization Under Section 214
of the Communications Act

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 1988; Released: March 28, 1988

By the Chief, Common Carrier Bureau:

1. Before the Bureau is a joint application filed by International Relay, Inc. (IRI), and Telecom International Services, Inc. (TIS), seeking Commission approval for the assignment to TIS of IRI's existing common carrier authorization obtained under Section 214 of the Communications Act, 47 U.S.C. § 214.[1] For the reasons discussed below, we grant the application.

2. IRI holds a certificate of public interest, convenience and necessity granted by the Commission pursuant to Section 214 which authorizes it to lease international circuits from facilities-based international common carriers and to use this leased capacity to provide an international telex message forwarding service between the United States and the United Kingdom.[2] It wishes to sell this business to TIS. TIS, a wholly-owned subsidiary of Telecom International Services PLC, a United Kingdom corporation, is a newly-formed corporation organized under the laws of the state of Delaware for the purpose of acquiring the subject authorization. TIS proposes generally to operate its international carriage business in the same manner that IRI operates it today, leasing the same facilities, selling its services to the same customers, and operating under the same tariff under which IRI now operates.[3]

3. Applicants assert that a grant of the application would be in the public interest. TIS would essentially step into IRI's shoes and provide the same service to the public now provided by IRI. Applicants contend that the ownership of TIS by a United Kingdom corporation is consistent with the public interest criteria established in *International Competitive Carrier Policies*, CC Docket No. 85-107, 102 FCC 2d 812, 842-43 (1985), *recon.*, FCC 86-309 (released Aug. 7, 1986). Although TIS would be classified as a dominant carrier because more than 15 percent of its outstanding shares are owned by a foreign communications entity, nevertheless, it alleges it would be unable to exercise market power in any international telecommunications market. Applicants explain that TIS would have only a small share of the telex market between the United States and the United Kingdom, and it does not own or control any bottleneck or other monopoly facilities. Applicants urge the Commission to conclude that the foreign ownership of TIS will not constitute an obstacle to approval of the application.

4. We must review the proposed acquisition not only under the Communications Act, but also under Section 7 of the Clayton Act, 15 U.S.C. § 18, over which we have direct enforcement authority. 15 U.S.C. § 21. Section 7 proscribes the acquisition of the stock, other share capital, or assets of a company by another company where the effect may be to lessen competition substantially or tend to create a monopoly in any line of commerce. After a review of the application and the underlying documents and agreements, we find that the proposal is consistent with both Acts and is in the public interest. Turning first to the Clayton Act concerns, the proposed acquisition appears to be competitively neutral since both companies are small players in the telex business and thus there is little likelihood that competition will be affected.[4] As to a public interest analysis under the Communications Act, the Commission has already recognized the public interest, convenience and necessity of these service offerings in granting the original Section 214 authorization. The continuance of this service is also clearly in the public interest. Our review of the application has revealed nothing to indicate any concerns with respect to TIS replacing IRI in providing this service, and we foresee no undue threat to competition posed by the foreign ownership of TIS. Therefore, we find that the public interest is served by the requested assignment of IRI's common carrier authorization and we will grant the application. TIS will, of course, be subject to Commission regulation as a dominant carrier since more than 15 percent of its outstanding shares are owned by a foreign communications entity.

5. Accordingly, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, IT IS ORDERED that the above-captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] A public notice of this application was released on August 19, 1987 (DA 87-1102). No comments were filed in response thereto.

[2] IRI is engaged in other business enterprises, but this is the only one it proposes to transfer by this application.

[3] To the extent that IRI's application might be considered an application to terminate service, triggering the customer notification rules of Section 63.71 of the Rules, 47 C.F.R. § 63.71, IRI requests a waiver since its customers will continue to receive service from TIS under the same conditions. This request is hereby granted since it is apparent that no customer service will be disrupted by the instant transfer of control.

[4] No Hart-Scott-Rodino materials were filed regarding this transaction because the dollar amounts involved were below the minimums set forth in 16 C.F.R. § 802.20. Letter from Patrick J. Whittle to Federal Communications Commission (Jan. 11, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

T-COM, INC.
(Assignor)

and File No. 22893-CD-AL-1-85

AMERICAN PAGING, INC.
(of Connecticut)
(Assignee)

For consent to assign the license of Public Land Mobile Service Station KNKC345 in Northford, Connecticut.

In re Application of

T-COM, INC.
(Assignor)

and File No. 22822-CD-AL-1-86

AMERICAN PAGING, INC.
(Assignee)

For consent to assignment of the licenses for Stations KNKD576 in Hartford, Connecticut and KNKD574 in Springfield, Massachusetts.

NOTICE OF APPARENT LIABILITY AND ASSIGNMENT OF LICENSES

Adopted: March 14, 1988; Released: March 28, 1988

By the Chief, Common Carrier Bureau:

1. The Bureau hereby serves notice on T-Com, Inc. (T-Com), that its construction of the captioned stations KNKC345 and KNKD574 at the time it notified the Bureau of completion of construction does not appear to meet the standards of Section 22.43 of the Rules, 47 C.F.R. § 22.43. In view of this apparent violation, we further serve notice on T-Com that it is apparently liable for a forfeiture as provided for in Section 503(b) of the Communications Act of 1934 (the Act). 47 U.S.C. § 503(b). We issue this Notice of Apparent Liability, based on the facts set forth below, in accordance with Section 503(b) of the Act and Section 1.80 of the Commission's Rules and Regulations, 47 C.F.R. § 1.80. Further, upon payment of the aforementioned forfeiture, the assignment of licenses for KNKC345 and KNKD574 is authorized. In addition, the assignment of the license for KNKD576 in Hartford, Connecticut, is authorized.

I. BACKGROUND

2. On April 5, 1985, T-Com filed notices that it had completed construction of stations KNKC345 and KNKD574 located in Northford, Connect- icut and Springfield, Massachuetts, respectively. The construction permit for station KNKC345 was due to expire on April 9, 1985, and that for KNKD574 on April 22, 1985. Also on April 5, 1985, T-Com and American Paging, Inc. (API), entered into an agreement whereby T-Com was to assign these stations, as well as KNKD576 in Hartford, Connecticut, to API. An application for assignment of KNKC345 was received on April 11, 1985; an assignment application for KNKD574 and KNKD576 was received on April 3, 1986. On May 28, 1985, Henry M. Zachs, d/b/a Massachusetts-Connecticut Mobile Telephone Company (Zachs) filed a Request for Investigation of T-Com with respect to both KNKC345 and KNKD574.[1] In his request, Zachs represented that neither station was operational and that the transmitters were not connected to a power source. He further stated that it appeared that KNKC345 could not be made operational, because the antenna site owner forbade it, fearing interference with a cable television operation located at the same site. In addition, Zachs claimed that T-Com had not obtained approval from Massachusetts to operate a paging service in Springfield and therefore could not activate KNKD574. These allegations, Zachs concluded, raised questions of lack of candor and/or misrepresentation since T-Com represented to the Commission it was fully operational. Zachs added that it seemed that API installed the transmitters, raising a question of unauthorized assignment of the licenses. Zachs further claimed that both permits had expired because the stations were not in operation during the time allowed by the permit.

3. In its opposition of June 24, 1985, T-Com did not challenge the facts alleged by Zachs but did challenge the inferences and legal conclusions drawn therefrom. It concluded that Section 22.43 of the Rules does not require facilities to be in operation at the time permittee notifies the Bureau of the completion of construction.[2] T-Com states that the Rule merely requires that the facilities be ready for operation at that time, and both of these stations met that standard. It further represents it was informed by the site owner at Northford that it could not operate at that location only three weeks before the permit deadline. T-Com installed the transmitter anyway and began looking for a new transmitting site. T-Com also claims that, under Section 22.13 of the Rules, it was entitled to a year after licensing before it was required to start serving the public.[3] As to the Springfield operation, T-Com again argues that it constructed the facility properly, but did not begin serving the public because the proceeding in which it was seeking to gain approval to operate from Massachusetts had been delayed by a protest filed by Zachs. T-Com admits that API constructed both stations, but did so in accordance with a construction contract under which T-Com was to retain all control of the facilities. Finally, T-Com concludes that its construction was in accordance with the Rules and, therefore, neither permit expired.

4. Zachs, in a reply filed July 9, 1985, took issue with T-Com's interpretation of the Commission's Rules, particularly with respect to its interpretation of Section 22.43. He pointed out that Section 22.43(a)(2) at that time required that a licensee perform commencement of service tests, which could not have been conducted because there was no power supply at either location, and at Northford, could be accomplished only over the veto of the site

owner. Similarly, Zachs disputed T-Com's interpretation of Section 22.13(f), which Zachs claimed applied only to state certification situations. Finally, Zachs said the Bureau should examine the contract between T-Com and API to determine whether T-Com actually retained control of the stations, which it was required to do. *See Radio Telephone Service, Inc.*, Mimeo No. 35595 (Common Carrier Bureau, released September 3, 1980). On July 9, 1985, Zachs also filed a Supplement to Request for Investigation that asked the Bureau to forbid T-Com from relocating its Northford station until the instant transfer-of-control proceeding was concluded. T-Com opposed the Supplement in an Opposition filed July 29, 1985. It stated therein that the Northford station had been relocated and that the Commission had been notified on July 15, 1985.

5. On August 6, 1985, the Chief, Mobile Services Division, wrote to T-Com, requesting the following information: (1) the date power was connected at Northford; (2) the date the transmitter was connected to control lines at Northford; (3) the date service tests commenced at Northford and their duration; (4) whether service was offered to the public at Northford and Springfield; and (5) the number of subscribers. T-Com's reply, filed August 26, 1985, responded to the first two questions as it had in its Opposition, *i.e.*, that power was not connected at either location. In reply to the third question, it said the Northford facility had been relocated and service tests had commenced on July 13, 1985. With respect to the fourth question, T-Com said that service was being offered from the relocated KNKC345 in Northford, but that there were no subscribers in Springfield since it was not on the air because it lacked a state certificate. Finally, T-Com cited a Commission *Order on Reconsideration* which recognized that confusion had existed among permittees about the new rules since the revision of Part 22 of the Rules. 101 FCC 2d 799 (1985).

6. On August 9, 1985, Zachs wrote to the Bureau, requesting that T-Com be ordered to cease operating the relocated station KNKC345. Zachs claimed the station was moved after Zachs filed his July 9, 1985 request that the Bureau forbid such a move while this proceeding was pending. Zachs further claimed that T-Com had no authority under the Rules to relocate the station without prior approval from the Commission.[4]

7. The captioned application for assignment of licenses KNKD576 and KNKD574 to API was filed on April 3, 1986, and elicited two Petitions to Deny. One petition was filed by Zachs, which repeated his earlier arguments. The second petition was filed by Airphone Company, Inc. (Airphone). Airphone recites its version of the history of T-Com's construction or lack of construction, which was similar in all relevant respects to that previously described by Zachs, and also alleges that T-Com assigned the license to API without Commission authorization.

8. T-Com differentiates between Hartford and Springfield in its Opposition. It points out that no allegations have been raised regarding the Hartford facility and therefore no opposition to assignment of KNKD576 has been filed. As for the Springfield license, T-Com admits that the station was not operational, but claims that this was because it still lacks state certification. T-Com concludes that, since it was not operational, its license could not have been assigned. The Replies emphasize that the Springfield facility had not been in operation for more than a year after the notification of completion of construction and thus the construction permit had expired pursuant to Section 22.303 of the Rules, 47 C.F.R. § 22.303.[5]

II. DISCUSSION

9. No allegation of misconduct has been raised with respect to station KNKD576 in Hartford, Connecticut and therefore the assignment of that license is approved. With respect to the remaining stations, we do not accept T-Com's interpretation of the Rules. For that reason we are issuing this Notice of Apparent Liability. However, we will approve a transfer of the licenses, conditioned on payment of the forfeiture, since no evidence has been submitted to support an allegation of deliberate violations of the Rules or of deliberate misrepresentations to the Commission. Indeed, it is reasonable to conclude that there was a certain amount of confusion arising from substantial changes in the Commission's Rules at the time in question, which could explain T-Com's actions.

10. All of Part 22 was revised in the *Report and Order in the Matter of Revision and Update of Part 22 of the Public Mobile Radio Service Rules*, 95 FCC 2d 769 (1983). That document was followed by an *Order on Reconsideration*, 101 FCC 2d 799 (1985). One of the purposes of the latter *Order* was to provide clarification for some of the new Rules. More recently, an *Order on Further Reconsideration* was issued. 62 RR 2d 861 (released March 26, 1987). This *Order* too was intended to provide clarification.

11. T-Com has pointed out that prior to the 1983 revision the Rules did not define "construction" or "ready for operation." After the 1983 revision, "ready for operation" was to be "evidenced by the commencement of service tests" (Section 22.43(a)(2)). Prior to the 1983 rewrite, service tests had been optional (Section 22.212(a)). After the rewrite, many petitions for reconsideration were filed, and the new Section 22.43 was among the new Rules questioned. In these circumstances, some uncertainty was unavoidable. We do not absolve T-Com of its violations of Section 22.43. If T-Com had filed a request for clarification of the Rules, it could have learned how to avoid these violations. Although we find that T-Com did violate the Rules, we do not conclude that we must hold a hearing as the petitioners insist. The facts are not in issue. Rather the interpretation of the facts and the legal conclusions to be drawn therefrom are at issue. In such a situation a hearing is not required. *Gencom, Inc.*, v. *FCC*, 832 F.2d 171 (D.C. Cir. 1987).

12. We reach the same conclusion with regard to T-Com's relocating station KNKD576 in Hartford without first obtaining Commission permission. T-Com's interpretation of the Rules was incorrect, but we do not see evidence of a deliberate violation of the Commission's Rules. T-Com could not lawfully relocate its main station under Section 22.17 as it claimed, which addresses only the addition of a transmittal site using the same frequency as the main station.

13. With respect to the alleged unauthorized assignment of licenses to API, the record is clear that T-Com had not put the Springfield station into operation due to lack of state certification apparently because of opposition from Zachs at the state level. Thus, there is no operation to assign. As for the other locations, we also find that there was no unauthorized assignment. *Radio Telephone Service, Inc.*, explains:

The normal minimum incidents of such exclusive responsibility include the unfettered use of all facilities and equipment used in connection with the stations' operation; day-to-day operation and control; the determination and carrying out of policy decisions, including the preparation and filing of applications with this Commission; employment supervision and dismissal of personnel; the payment of financial obligations including expenses arising out of operation; the receipt of moneys and profits derived from the operation of the radio facilities; and the recognition, on the part of a carrier's customers, of the licensee as the entity responsible for the operation and control of the subject stations.

Radio Telephone Service, Inc., slip op. at 2. In the present case actual operating experience was extremely limited. T-Com secured the sites, negotiated a management contract with API, established the construction schedule and filed all necessary applications. Given the facts of this case, and the lack of any further incidents of control by API, we believe no unauthorized assignment has occurred.[6] Also, since T-Com timely filed notices of completion which it believed were sufficient under the Rules, the clarity of which was in considerable flux at that time, we conclude that its permits were valid at all times.

14. In conclusion, we find that T-Com has violated the Rules by not constructing its station within the period allowed by Section 22.43, and some sanction is necessary. In fashioning appropriate penalties, we are required to consider "the nature, circumstances, extent, and gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matter as justice may require." 47 C.F.R. § 503(b)(2). As described above, we note the likely confusion that accompanied the Rule revisions and that T-Com's Springfield station was kept out of operation by protests at the state level by Zachs. (T-Com kept the Bureau fully apprised of this matter.) In addition, the relocation of the Northford facility was reported to the Commission and covered the same contour as before the relocation and, thus, did not cause any interference. The sanctions available to the Commission range from a written warning to revocation of the outstanding licenses in question and a $20,000 forfeiture pursuant to Section 312 and/or Section 503 of the Communications Act. On the facts of this case, we conclude that a forfeiture of $5,000 is appropriate and that no more severe sanction is warranted. This is in accord with the severity of penalty determined in similar proceedings. *See Carnival Cruise Lines, Inc.*, DA 87-73 (released January 28, 1987). Accordingly, we grant the assignment of licenses, subject to the condition precedent that a $5,000 forfeiture is deposited with the Commission prior to consummation of the transaction.

III. ORDERING CLAUSES

15. IT IS ORDERED, pursuant to Section 503(b) of the Communica- tions Act of 1934, as amended, 47 U.S.C. § 503, and Section 1.80 of the Commission's Rules and Regulations, 47 C.F.R. § 1.80, that T-Com, Inc., is apparently liable for forfeiture in the amount of $5,000 for violation of Sections 22.43 and 22.9 of the Rules, 47 C.F.R. §§ 22.9, 22.43.

16. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that T-Com may within thirty days of the date of this notice pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Comission's Rules, or may file a response showing why forfeiture should not be imposed or should be reduced.

17. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for forfeiture shall be sent by certified mail, return receipt requested, to T-Com, Inc., P.O. Box 3005, Jackson, Mississippi 49204.

18. IT IS FURTHER ORDERED, pursuant to Section 22.39, that T-Com, Inc., is authorized to assign American Paging, Inc., the license for station KNKD576 in Hartford, Connecticut.

19. IT IS FURTHER ORDERED, pursuant to Section 22.39, that upon payment of the aforementioned forfeiture, T-Com, Inc., is authorized to assign to American Paging, Inc., the licenses for station KNKC345 in Northford, Connecticut, and station KNKD574 in Springfield, Massachusetts.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] No objection was raised with respect to station KNKD576.

[2] Prior to a 1983 rule revision Section 22.43, 47 C.F.R. § 22.43, provided in pertinent part:

§ 22.43 Period of construction.

(a) Except as may be limited by § 22.35(b), each construction permit for a radio station in the Domestic Public Radio Services will specify the date of grant as the earliest date of commencement of construction, and a maximum of 8 months from the date of grant as the time within which construction will be completed and the station ready for operation, unless otherwise determined by the Commission upon proper showing in any particular case.

Following the 1983 revision the pertinent section provided:

§ 22.43 Period of construction.

(a)(1) *General rule.* A radio station authorization shall specify the date of grant as the earliest date for commencement and construction.

(2) The station must be completed and ready for operation, as shown by commencement of service within 12 months after the grant of the radio station authorization. In the case of offshore telephone stations, the period shall be 18 months.

(3) If construction is not completed within the time period set forth in this rule or if the extension of time to complete construction is not timely requested the authorization for the unconstructed facility will automatically expire. Within 30 days after the authorization expires an extension of time and reinstatement request may be filed on Form 489.

[3] T-Com argued, page 6, footnote:

See Section 22.13(f)(1), which provides that a station need not be "in operation" until one year after the date of the license grant. Under the two-step licensing procedure established by the Part 22 rewrite, the date of the license grant is the date of notification of completion of construction.

[4] Zachs also filed an Informal Request for Commission Action on October 10, 1985, which essentially reiterated arguments made previously. T-Com opposed the request on procedural grounds, and filed additional pleadings at the end of 1985, which added nothing substantive to the record.

[5] Section 22.303, 47 C.F.R. § 22.303, provides as follows:

§ 22.303 Discontinuance of station operation.

If a station licensed under this part discontinues operation on a permanent basis, the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section, any station which has not operated for 90 continuous days is considered to have been permanently discontinued unless the applicant has notified the Commission otherwise prior to the expiration of the 90 day period and provided a date when operation will resume, which shall not be in excess of 30 additional days.

[6] A question has been raised whether T-Com violated state law by installing its transmitter in Springfield. The resolution of this issue will be reached by the proper local authorities. We have independently reviewed the matter and found no violation of federal regulation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of KCCO-KRLG, Inc.

Licensee of Radio Stations
KCCO and KRLG(FM)
Lawton, OK
for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1988; Released: March 28, 1988

By the Commission:

1. The Commission has before it an application filed on June 8, 1987, seeking review of the Mass Media Bureau's Memorandum Opinion and Order released May 6, 1987.

2. The Memorandum Opinion and Order released May 6, 1987, assessed a forfeiture of $6,000 for the licensee's repeated violation of Section 73.1211(a) of the Commission's Rules in that Stations KCCO and KRLG(FM), Lawton, OK, broadcast announcements on behalf of the Comanche Nation Tribe's bingo games.[1] The Bureau determined that all the elements of a lottery were present and that the announcements promoting the bingo games had been broadcast for some time in the past and are continuing.

3. We have reviewed the Mass Media Bureau's action and the arguments made by the licensee and find no error in the Bureau's resolution of this matter. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules, the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTE

[1] § 73.1211(a) provides in pertinent part that: "No licensee of an AM, FM, or television broadcast station, except as in paragraph (c) of this section [pertaining to certain State-run lotteries], shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes." Moreover, bingo, as generally played, with its elements of prize, chance and consideration, is considered to be a lottery activity for the purposes of 18 U.S.C. § 1304, and §73.1211 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-351

In the Matter of

WGRI RADIO INCORPORATED

Licensee of Radio Station WGRI(AM)
Griffin, Georgia

Order to Show Cause Why the License
of Station WGRI(AM), Griffin, Georgia
Should Not Be Revoked

ORDER OF REVOCATION

Adopted: March 11, 1988; Issued: March 28, 1988

By the Commission:

1. This proceeding began on September 10, 1987, when the Commission released its *Order to Show Cause and Notice of Apparent Liability*, 2 FCC Rcd 5500 (1987) (*Order to Show Cause*). The Commission ordered WGRI Radio Incorporated, (hereinafter WGRI or licensee) to show cause why its license for WGRI(AM) should not be revoked.[1] The Commission specified an issue "To determine whether WGRI Radio Incorporated violated Section 73.1740(a)(4) and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine in light of the evidence adduced whether WGRI possesses the requisite qualifications to remain a Commission licensee. WGRI has failed to respond in any way to the Commission's *Order to Show Cause* and, thus, pursuant to Section 1.92(a) of the Commission's Rules has waived its right to a hearing. Accordingly, on November 18, 1987, the Chief, Administrative Law Judge terminated this proceeding and certified this matter to the Commission for disposition pursuant to Section 1.92(c) of the Commission's Rules. *See Order*, FCC 87M-2948, released November 18, 1987.

2. This revocation is based upon the following uncontested facts. On January 23, 1985, the General Manager of WGRI(AM) advised the Commission that on January 13, 1985, a fire had caused the station to cease operation temporarily. The licensee stated that it expected to reinstitute operation by February 10, 1985. This is the last correspondence received by the Commission from the licensee. In June 1987, monitoring by the Field Operations Bureau confirmed that the station had not returned to operation. Moreover, the licensee has neither requested Commission permission to discontinue operation temporarily or permanently nor turned in its license.

3. The licensee has repeatedly failed to respond to Commission correspondence. For example, the Commission sent both a letter of inquiry and the *Order to Show Cause* to the two addresses listed for the licensee in Commission records. [3] This correspondence was returned to the Commission by the U.S. Postal Service as "undeliverable." A copy of the *Order to Show Cause* was also sent by CERTIFIED MAIL - RETURN RECEIPT REQUESTED to John L. Hatfield. Hatfield is the President, Treasurer and a Director of the licensee and owns 50% of the stock of the licensee's parent corporation. The return receipt indicates that the copy of the *Order to Show Cause* was delivered to Hatfield on September 17, 1987. Subsequently, copies of all pleadings and orders were sent to Hatfield as well as William F. Sumner, the Vice President, Assistant Secretary and a Director of the licensee, also by certified mail.

4. The *Order to Show Cause* directed WGRI to file a notice of appearance. No such notice has been filed. Accordingly, pursuant to Section 1.92(a)(1) of the Commission's Rules, WGRI has waived its right to a hearing. In addition, WGRI has failed to respond to the Mass Media Bureau's Request for Admission of Facts filed on September 30, 1987. Thus, pursuant to Section 1.246 of the Commission's Rules, all of the matters contained therein are deemed admitted. WGRI also failed to respond to the Mass Media Bureau's Motion to Terminate Hearing and Certify Case to the Commission filed on October 26, 1987. Finally, WGRI failed to appear at the prehearing conference held on November 16, 1987.

5. It is clear from the record in this proceeding that WGRI(AM) ceased operation in January 1985, has not returned to operation in the three years since then and has never sought the Commission's permission to temporarily or permanently discontinue operation. Moreover, WGRI has repeatedly failed to respond to Commission correspondence and has declined to participate in the instant proceeding.

6. In view of the foregoing, it is concluded that WGRI has willfully and intentionally violated the provisions of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules. Accordingly, the Commission ORDERS that the license of Station WGRI(AM), Griffin, Georgia, IS REVOKED, effective immediately. This action is taken pursuant to the authority contained in Section 312(a)(3), (a)(4) and (c) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Although the Commission's *Order to Show Cause* included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, because of the action taken herein, no forfeiture is being imposed.

[2] Section 73.1740(a)(4) provides:

> (4) In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C.

no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures.

In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[3] Section 1.5 of the Commission's Rules requires that the licensee keep the Commission informed of any change in its mailing address.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
REX K. JENSEN, Former Licensee of
Station KRTZ-FM, Cortez, Colorado
For Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1988; Released: March 28, 1988

By the Commission: Commissioner Quello concurring in the result.

1. The Commission has before it for consideration an Application for Review, filed June 12, 1987, by Rex K. Jensen (Jensen), former licensee of Station KRTZ-FM, Cortez, Colorado. Jensen seeks review of the May 13, 1987 *Memorandum Opinion and Order (MO&O)* wherein the Acting Chief, Mass Media Bureau, declined to reduce or rescind a $6,000.00 forfeiture imposed against Jensen for repeatedly violating 47 C.F.R. § 73.1211[1] and 18 U.S.C. § 1304.[2]

2. Jensen does not dispute that KRTZ-FM broadcast advertisements promoting bingo games sponsored by the Ute Mountain Ute (Indian) Tribe from three to thirty-three times per day on eighty-four days between September 7, 1984, and August 24, 1985, during which period Jensen was the licensee of KRTZ-FM. Nor does Jensen dispute that the bingo games in question constituted lotteries, the broadcast of advertisements for which is prohibited by the referenced provisions. Rather, Jensen argues that the forfeiture amount should be substantially reduced or eliminated because:

> (a) Jensen's conduct was based on a reasonable, good faith, albeit erroneous, interpretation of the lottery rules; (b) the forfeiture amount is arbitrary and an abuse of discretion; (c) proposals before Congress to rescind the lottery rules would permit the type of advertising for which Jensen has been assessed a forfeiture; and (d) 47 C.F.R. § 1211 and 18 U.S.C. § 1304 are facially unconstitutional because they infringe on Jensen's freedom of speech guaranteed by the First Amendment to the Constitution of the United States. [3]

3. With respect to the first argument, Jensen states that it was his understanding that the test to determine the legality of lottery advertisements is "whether they were privately or governmentally (state) sponsored." Based on this premise, Jensen argues that it was reasonable to have concluded that the Ute Mountain Ute bingo games "were totally different from private, and possibly illegal, lotteries, since Indian tribes . . . are semi-sovereign 'domestic dependent nations' who retain all sovereign powers not preempted by federal oversight."[4]

4. We believe that neither the premise upon which Jensen relies nor his conclusion is reasonable. As we have previously stated, 18 U.S.C. § 1304 generally prohibits the broadcast of advertisements of, or information concerning, lotteries. However, 18 U.S.C. § 1307(a) provides that this general prohibition shall not apply to the broadcast of advertisements of, or information concerning, lotteries conducted by a "State acting under the authority of State law." Title 18 U.S.C. § 1307(c)(1) unambiguously defines the term "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States." Both the statute and its legislative history are devoid any reference to "Indian tribal governments," "Indian reservations," "Native Americans," or any like term or phrase in connection with the definition of a "State."[5] Therefore, it is plain that Congress did not intend that the "State-conducted" exception to the general lottery prohibition apply to the broadcast of lotteries conducted by Indian tribal authorities.[6]

5. Based on the foregoing, we conclude that Jensen's justification for repeatedly broadcasting advertisements on behalf of the Ute Mountain Ute (Indian) Tribe is not credible and does not provide any warrant for reducing or rescinding the forfeiture amount. Clearly, in an era of deregulation, the Commission must insist on full licensee compliance with all requirements that remain in effect. Moreover, it is a long-standing Commission policy not to excuse licensees for violations occasioned by a misinterpretation of its rules. *See Stereophonic Alaska, Inc.*, 20 F.C.C. 2d 556 (1969).

6. Nor do we believe that the staff abused its discretion or acted arbitrarily in imposing a forfeiture against Jensen in the amount of $6,000.00. In support of his position that in prior cases willful participation in illegal schemes has resulted in proportionately lesser punishment, Jensen relies on the Commission's decisions in *TransNational Network, Inc.*, 52 R.R. 2d 1321 (1982); *De La Hunt Broadcasting Corp.*, 51 R.R. 2d 1189 (1982); and *WIGO, Inc.*, 48 R.R. 2d 1363 (1981). These decisions, however, are inapposite. In *TransNational*, a case involving the failure by a resale common carrier to respond to official Commission inquiries, a forfeiture of $8,000.00 was reduced to a nominal amount ($100.00) because of the licensee's subsequent bankruptcy. In the instant case, Jensen does not assert that he is bankrupt or otherwise lacking the financial wherewithall to pay the forfeiture assessed against him. In *De La Hunt Broadcasting*, the Commission assessed a forfeiture in the amount of $2,000.00 against a broadcast licensee who charged more than the lowest unit charge covering 1,113 political advertisements. However, unlike the licensee in that case who made refunds to all political candidates who were overcharged, Jensen presents no evidence to counter the presumption that he derived a substantial benefit from the illegal broadcast of advertisements for the bingo games. Finally, in *WIGO*, the Commission imposed a forfeiture in the amount of $10,000.00 against a licensee who actively engaged in broadcasting "sermons by ministers" to promote illegal numbers games. Jensen fails to note, however, that the forfeiture imposed in *WIGO* represented at the time the most severe monetary sanction available to the Commission. The Commission determined in that case that the imposition of a forfeiture in the maximum amount was justified under the circumstances. The sanction here imposed against Jensen is far less than the

$20,000 limit now available to the Commission. In contrast to our finding in *WIGO*, we do not find that imposition of a forfeiture in the maximum amount is warranted in this case. We do find, however, that a forfeiture in the amount of $6,000.00 is entirely justified given all relevant facts, including the number of illegal lottery advertisements broadcast over KRTZ-FM.

7. We would add that the Commission, in assessing a monetary forfeiture under Section 503 of the Communications Act of 1934, as amended, takes into consideration many factors, including the seriousness of the violations, the circumstances under which they were committed, and their duration. In this regard, the Commission has discretion as to the amount of the forfeiture to be assessed in each individual case based on its analysis of all the relevant facts. *Triple X Broadcasting Co., Inc.*, 46 R.R. 2d 788, 789 (Broadcast Bureau 1979), *citing Brennan Broadcasting Co.*, 25 F.C.C. 2d 400 (1970). "[T]he Commission is not bound to deal with all cases at all times as it has dealt with some that appear comparable." *Triple X Broadcasting, supra, citing Continental Broadcasting Co., et al.* v. *FCC*, 439 F.2d 580 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 905 (1971). We have again reviewed the facts and circumstances presented in the instant case and conclude that the forfeiture imposed against Jensen was an appropriate exercise of agency discretion.

8. We also find no merit to Jensen's argument that the result in this case should have been different because of the pendency in 1986 of proposals to modify 18 U.S.C. § 1304 to allow the broadcast of advertisements of, or information concerning, lotteries conducted by Indian tribes.[7] First, the existence of pending legislation does not mean that the proposed changes will be enacted into law. Indeed, the specific bill to which Jensen refers was not enacted into law. Second, unless and until the anti-lottery statute is modified or rescinded by Congress, the Commission is duty-bound to enforce the existing provisions encompassed therein. In this regard, the Commission has previously determined that the mere pendency of legislation is no basis for any change in the Commission's Rules. *Lottery Rules*, 11 R.R. 2d 1675 (1967). We note as well that a doctrine that would permit the Commission to cease enforcing statutes, *sua sponte*, because of the mere pendency of proposals to change those statutes is one which we do not accept and which our system of government would not tolerate. As we stated in *Lottery Rules*, "[i]f the statute is amended we will at that time be in a position to consider any appropriate revisions of the pertinent rules." *Id.*

9. With respect to Jensen's final claim that 18 U.S.C. § 1304 is constitutionally infirm, we believe that the issue has been settled for nearly two decades. The Court of Appeals for the Second Circuit ruled in 1969 that Section 1304 is constitutional, stating that the statute "neither improperly restricts broadcasters to an official government view nor inhibits the free expression of ideas by reason of its overbreath." *New York State Broadcasters Association* v. *United States*, 414 F.2d 990, 991 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).[8] Therefore, Jensen's argument that the forfeiture in this instance must be rescinded because the statute and regulation upon which it is based are unconstitutional and violate his right of free speech, must, in the final analysis, fail.

10. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed June 12, 1987, by Rex K. Jensen, former licensee of Station KRTZ-FM, Cortez, Colorado, IS DENIED.

11. IT IS FURTHER ORDERED, That Rex K. Jensen SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of six thousand dollars ($6,000.00) for repeatedly violating 47 C.F.R. § 73.1211 and 18 U.S.C. § 1304. Payment of this forfeiture may be made by mailing to the Commission within thirty (30) days of the release of this Order a check or similar instrument drawn to the order of the FEDERAL COMMUNICATIONS COMMISSION.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Section 73.1211(a) of the Commission's Rules prohibits the broadcast of advertisements of, or information concerning, lotteries. However, the broadcast of advertisements of, or information concerning, lotteries conducted by a State under authority of State law is expressly excluded from this general prohibition by 47 C.F.R. § 73.1211(c).

[2] Title 18 U.S.C. § 1304 provides that any person who broadcasts an advertisement of, or information concerning, a lottery shall be subject to a fine of not more than $1,000.00 or imprisonment of not more than one year, or both. Each broadcast constitutes a separate offense. This general prohibition does not apply to the broadcast of lotteries conducted by a State acting under authority of State law. *See* 18 U.S.C. § 1307.

[3] With the exception of his constitutional claim, all of Jensen's arguments were previously raised and resolved in favor of sustaining the imposition of the subject $6,000.00 forfeiture. Jensen's constitutional argument is raised here for the first time. Section 1.115(c) of the Commission's Rules provides that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Since the instant Application for Review relies primarily upon issues other than Jensen's constitutional claim, we will consider his pleading in its entirety. However, we remind Jensen and all licensees that applications for review of matters considered pursuant to delegated authority should not be used as vehicles for raising new factual and legal issues.

[4] Citations omitted.

[5] *See* 1974 U.S. Code Cong. & Ad. News 7007. Additionally, there is no evidence to suggest that the terms "territory" or "posession" as used in Section 1307, encompasses Indian tribal governments, Indian reservations, or Native Americans. In this regard, we note that the Department of the Interior recognizes only two types of territories, neither of which encompasses Native American lands. An "incorporated territory" refers to an area which the Congress has "incorporated" into the United States by making the Constitution applicable to it. The last two incorporated territories recognized by the Federal Government were Alaska and Hawaii. An "unincorporated territory," or "possession," refers to any area to which the Constitution has not been expressly and fully extended. Such areas include, for example, American Samoa, Guam, and the Virgin Islands. Indian tribal

lands, by contrast, are not regarded by the Department of the Interior as "incorporated territories," "unincorporated territories" or "possessions" of the United States. *See generally, Ex Parte Morgan*, 20 F. 298 (District Court, W.D. Arkansas 1883) (stating that the word "state" and the word "territory" have attached to them, under the constitution and laws of the United States, a technical meaning, neither of which encompassed the Cherokee (Indian) Nation. Instead, the Court stated that the Cherokee Nation is part of what is called "Indian Country.).

[6] This point is reinforced by Jensen's reference in his Application for Review to the 1986 "Indian Gaming Regulatory Act," H.R. 1920, and the Commission's 1986 "FCC Legislative Proposals." Had it been enacted into law, the former would have extended the "State-conducted" exception to the broadcast of advertisements of, or information concerning, lotteries conducted by Indian tribes. The latter included a proposal which would have permitted the broadcast of advertisements of, or information concerning, any lottery that is lawful in the state where it is conducted. If Jensen's conduct herein was consistent with 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211, as he claims, such legislation and legislative proposal would be entirely unnecessary.

[7] *See* n. 6, *supra*.

[8] Federal lottery laws, it should be noted, apply to advertisements distributed in newspapers as well as those that are broadcast. *See* 18 U.S.C. § 1301.

Before the
Federal Communications Commission
Washington, D.C. 20554

FRANK R. JAZZO, ESQ.
Fletcher, Heald & Hildreth
Suite 400, 1225 Connecticut Avenue, N.W.
Washington, D.C. 20036-2679

Adopted: March 4, 1988; Released: March 16, 1988

In re:

KJWH(AM) assignment application
Camden, Arkansas

Dear Mr. Jazzo:

This is in reference to the application (BAL-871007EC) for assignment of license of station KJWH(AM), Camden, Arkansas, from KJWH, Inc. to Gary D. Coates (Coates). Coates is also the licensee of station KBJT(AM), Fordyce, Arkansas, and a grant of the instant application will result in a violation of Section 73.3555 of the Commission's Rules due to the overlap of the 1 mV/m service contours of KJWH and KBJT.[1] Based upon your contention that the resulting overlap is *de minimis* in nature, you request a waiver of Section 73.3555(a) of the Commission's Rules.

You support your contention that the contour overlap is *de minimis* with a study by Dan Winn, your client's consulting engineer. You assert that the overlap, which occurs over a rural, sparsely populated area, encompasses only 41.99 square miles with an estimated population of only 50 people. While the overlap represents 5.16% of the total area within the 1 mV/m service contour of each station, the overlap affects only .17% of the total population within the 1 mV/m service contour of KJWH and .33% of the total population within the 1 mV/m service contour of KBJT. You add that the communities of license, Camden and Fordyce, are approximately 30 miles apart and constitute separate radio markets.

The basic principles embodied in the Commission's multiple ownership rule are to promote diversity of ownership in order to maximize the diversification of viewpoints, as well as to prevent any undue concentration of economic power contrary to the public interest. *See Multiple Ownership* Frank R. Jazzo, Esq. *Rules*, 97 FCC 2d 997 (1984), *recon. granted in part and denied in part*, 58 RR 2d 604 (1985), *further recon. granted in part and denied in part*, 1 FCC Rcd 802 (1986). The Commission is not, however, without flexibility to respond to situations where application of fixed multiple ownership standards would be contrary to other public interest concerns; thus, for example, in some cases we have waived the rules in order to achieve appropriate and desirable improvements of service. *See, Capital Cities Communications, Inc.*, 59 RR 2d 451 (1985). However, before such a waiver can be granted an applicant must sustain the burden of showing that the benefits to be achieved by its proposal are in the public interest and that waiver would not compromise the fundamental policies served by the rule.

The determination of whether an overlap is *de minimis* requires consideration of the totality of the circumstances, which includes the actual size of the overlap, the population within the overlap area and the percentage of area and population within each station's 1 mV/m contour represented by the overlap. Applying these principles to the information before us, we find that a grant of your request is warranted. While the 5.16% area within the overlap is larger than that traditionally found in *de minimis* cases, in light of the small actual overlap of 41.99 square miles involving a limited population of 50 persons (.17% of the population within the 1 mV/m contour of KJWH and .33% of the population within the 1 mV/m contour of KBJT), such overlap is in fact *de* minimis, and a waiver of Section 73.3555(a) is justified. The Commission has waived this rule in the past when the size of the overlap area and the population affected were similarly slight. *See* Radio Station WREN Co.,Inc., 52 RR 2d 601 (1982), WREL,Inc., 45 RR 2d 319 (1979). Further, a study discloses that the overlap area is served by approximately four AM, three FM and one TV stations as well as a cable TV system. Therefore, we believe that in the circumstances presented here, the waiver of Section 73.3555 will not result in an undue concentration of the media nor create any detriment to the policies underlying the rule.

Accordingly, your request for waiver of the duopoly provisions of Section 73.3555 of the Commission's Rules is hereby granted. Moreover, upon a finding that the applicant is qualified and the public interest will be served, the application to assign the license of KJWH(AM) from KJWH, Inc. to Gary D. Coates has been granted this date.

BY DIRECTION OF THE COMMISSION

H. Walker Feaster III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

EAST TEXAS
TELEVISION
NETWORK, INC.

KLPH-TV
Paris, Texas

For Modification of Construction Permit

KLPH-TV File No. BMPCT-861231KE
Paris, Texas

For Extension of Time to Construct

KLNL(TV)
Nacogdoches, Texas

For Modification of Construction Permit

KLNL(TV) File No. BMPCT-861231KF
Nacogdoches, Texas

For Extension of Time to Construct

KLDS(TV)
Denison, Texas

For Modification of Construction Permit

KLDS(TV) File No. BMPCT-861231KH
Denison, Texas

For Extension of Time to Construct

ORDER

Adopted: March 11, 1988; Released: March 29, 1988

By the Commission:

1. The Commission has before it for consideration: (a) the December 22, 1986, actions of the Deputy Chief, Mass Media Bureau, returning as unacceptable for filing the applications of East Texas Television Network, Inc. (East Texas) for modification of the construction permits of Stations KLPH-TV, Channel 42, Paris, Texas, and KLNL(TV), Channel 19, Nacogdoches, Texas; (b) East Texas' January 23, 1987, applications for review of those actions; (c) the January 20, 1987, action of the Deputy Chief returning as unacceptable for filing East Texas' application for the modification of its construction permit for Station KLDS(TV), Channel 20, Denison, Texas; (d) East Texas' February 18, 1987, application for review of that action; (e) the April 10, 1987, actions of the Deputy Chief denying the above-captioned applications of East Texas for extensions of time within which to complete construction of the three stations, cancelling the construction permits, and deleting the call signs; (f) East Texas' May 18, 1987, applications for review of those actions; and (g) related pleadings.

2. We have reviewed the actions of the Deputy Chief, Mass Media Bureau, and we conclude that the matters were fairly considered and properly decided under applicable precedent.[1] Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, East Texas' applications for review ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTE

[1] It should be noted that the modification applications were returned because they failed to meet any of the three criteria established for approval of such applications filed later than the first 12 months of the initial construction period. In promulgating this new policy, the Commission stated that, once current television permittees have been afforded 24 months to build, they will be required to meet the new stricter standard. *Construction of Broadcast Stations*, 102 F.C.C. 2d 1054, 1058, fn. 13 (1985). Since, at the time the new policy was adopted, East Texas had already held all three construction permits for more than two years, any subsequent modification applications would be subject to the new restrictions, and the policy was properly applied here.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 29, 1988

CENTEL CORPORATION PETITIONS FOR CLARIFICATION OF AFFILIATE TRANSACTION RULES PUBLIC COMMENT INVITED

On March 3, 1988, the Centel Corporation filed petition for clarification of § 32.27(d) of the Commission's Rules. That rule governs valuation of services in transactions between carriers and their nonregulated affiliates. The rule provides, *inter alia*, that services provided to a carrier by an affiliate must be valued at the market price if the affiliate provides the service to third parties. In the absence of third party transactions, services must be valued at the affiliate's cost.

In its petition, Centel seeks clarification as to the applicability of § 32.27(d) to situations in which a carrier takes services from an affiliate pursuant to a competitive bidding procedure. Centel asks whether the regulated telephone company may record the price for such services at the competitively bid price irrespective of whether the affiliate has also provided the same services to unaffiliated entities.

Comments on the Centel petition must be filed no later than **April 22, 1988.** Replies are due **May 9, 1988.** Comments should reference file number AAD 8-1921.

Copies of the Bell Atlantic filings may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Jane Jackson at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 29, 1988

BELL ATLANTIC AND US WEST SEEK PERMISSION TO CALCULATE GENERAL ALLOCATOR USING CURRENT MONTHLY DATA PUBLIC COMMENT INVITED

On March 14, 1988, the Bell Atlantic telephone companies (Bell Atlantic) filed a petition for waiver seeking permission to calculate the general allocator prescribed in § 64.901 of the Commission's Rules (the *Joint Cost* rules) using current month data. U S West, Inc., filed a similar petition for waiver on December 18, 1987.

In the *Joint Cost Order*, 2 FCC Rcd 1298 (1987), the Commission established a hierarchy of allocation techniques which carriers are to use in allocating common costs between regulated and nonregulated activities. *See* 47 CFR § 64.901(b). The least preferable of those techniques, to be used only when no cost-causative allocation method is available, is the use of a general allocator. The general allocator is "computed by using the ratio of all expenses directly assigned or attributed to regulated and nonregulated activities." 47 CFR § 64.901(b)(iii).

The *Joint Cost Order* instructed carriers to calculate the general allocator using current month data. On reconsideration, the Commission decided that this method would cause administrative problems for the carriers. The rule was therefore changed to require calculation of the general allocator using quarterly data collected in the three-month period ending two months before the current month. *See Order on Reconsideration*, 2 FCC Rcd 6283, 6292 (1987). Bell Atlantic states in its petition that it has developed a mechanized system which can calculate the allocator using current month data.

Bell Atlantic states that it should be permitted to use the original method of calculating the general allocator because it will not experience the administrative inconvenience that lead the Commission to change that method. U S West states that, before the *Order on Reconsideration* was released, it had already developed a system for calculating the allocator using current month data, and that changing to the new method would cause it unnecessary expense and inconvenience.

Comments on the waiver petitions must be filed no later than **April 12, 1988.** Replies are due **April 22, 1988.** Comments should reference the following file numbers: AAD 8-1922 (Bell Atlantic) and AAD 8-1923 (U S West).

Copies of the Bell Atlantic filings may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Bill Kehoe at (202) 632-7500.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone & Telegraph Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1885

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 1988; Released: March 29, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On November 12, 1987, American Telephone and Telegraph Company (AT&T)[1] filed a cost allocation manual pursuant to the *Joint Cost Order* [2] governing the accounting separation of AT&T's regulated and nonregulated costs. Consistent with the requirements of the *Joint Cost Order*, the manual is intended to be used on and after January 1, 1988, the same day that the revised Uniform System of Accounts (USOA) became effective. [3] Acting on authority delegated by the Commission, we permitted AT&T to implement its manual on an interim basis beginning January 1, 1988.[4] The instant Order addresses the issues raised by commenting parties and the Common Carrier Bureau (the Bureau) concerning AT&T's cost allocation proposals and directs AT&T to file a revised manual 60 days from the release date of this Order.

2. AT&T's manual presents, in narrative form, information on its proposed allocations of joint and common costs. The manual includes a discussion of proposed employee time reporting systems, including methodologies for capturing nonproductive work time. In a series of attachments to its manual, AT&T describes its affiliate transactions, incidental activities, and nonregulated activities. Three parties filed comments on AT&T's manual, and AT&T filed a reply.[5]

3. In addition to reviewing the pleadings, we have conducted our own review of AT&T's manual for consistency with the Commission's rules. We have concluded that while AT&T's manual is deficient in some respects, its format and content generally provide the Bureau with a sufficient understanding of the proposed cost allocation procedures to permit us to make an informed judgment as to the ability of the manual to prevent cross subsidy. We conclude that, overall, AT&T's manual provides sufficient assurance against the misallocation of costs and revenues to permit its permanent implementation.

4. We require, however, that in specific instances AT&T specify in greater detail the procedures it intends to follow in allocating the costs and revenues of regulated and nonregulated activities, and in some cases, to correct ambiguities and omissions in its manual. We shall require AT&T to submit revisions to its manual, and we shall solicit public comment on them. Any revisions to the manual that result from the instant Order approving the manual or a subsequent order concerning the revisions will be made effective retroactive to January 1, 1988. Requiring that all amendments to the manual be retroactive eliminates the necessity of having a manual that is fully approved in advance of its implementation. We therefore approve AT&T's cost allocation manual subject to a number of conditions and requirements for the submission of further information.

5. This Order only addresses areas in which AT&T's manual is deficient and is divided into three substantive sections. Section II discusses general issues, including portions of the manual that relate to employee time reporting, nonregulated activities, incidental activities, and affiliate transactions. Section III discusses issues raised in connection with the proposed apportionment methods and specific accounts. Section IV contains information concerning the procedural requirements for updating AT&T's cost allocation manual.

II. GENERAL ISSUES

A. Overall Sufficiency

6. The *Joint Cost Order* listed five types of information that must be included in the cost allocation manuals: (a) a description of each nonregulated activity; (b) a list of all the activities the company now accords incidental accounting treatment, and the justification for treating each as incidental; (c) a chart showing all corporate affiliates; (d) a statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms and frequency of such transactions; and (e) for each USOA account and subaccount, detailed specifications of the cost categories (or cost pools) to which amounts in the account or subaccount will be assigned, and of the allocation method for each cost category (or cost pool).[6] In addition, the manuals must contain a description of the methods used to teach, monitor, and enforce accurate time reporting, along with a description of the allocation of nonproductive time.[7]

7. Our review of AT&T's manual, as well as the comments and reply comments filed in this proceeding, reveals that AT&T's manual is sufficient to discourage cross subsidy. While a number of ambiguities and omissions exist, the problems with the manual can be readily corrected with the filing of additional information and amendments. Each of the subject-matter areas required by the Commission has been addressed, although some are not discussed in the detail we would like. We do not believe that the defects we have identified in the manual require its rejection.

8. In making this evaluation, we have examined AT&T's manual in detail to determine if the information provided permits us to make an informed judgment that the proposed manual will discourage cross subsidy. We have specifically explored cost allocation proposals to determine whether AT&T's manual provides us with a clear understanding of the basis upon which cost categories are formulated, and whether the manual provides a clear understanding of how the costs reflected in the cost categories are allocated between regulated and nonregulated activities. We find that, overall, the manual provides us

with the level of understanding necessary to conclude that the manual procedures will discourage cross subsidy. In a number of specific instances, however, additional information will be required before we can make this judgment for certain AT&T proposals. We therefore require AT&T to submit additional information in the form of revisions to its manual, as a condition of our approval of the manual. We will permit public comment on any changes that AT&T makes to its manual as a result of this Order.[8] In order to provide guidance to AT&T in fashioning its amendments, we will address each of the issues raised by the commenting parties, as well as additional issues we have identified.

B. Limited Implementation

9. MCI argues that our review of the AT&T manual will be greatly enhanced if we permit a "test-run" of the cost allocation proposals applicable to AT&T's FCC Tariff No. 12. According to MCI, a test of the manual in a limited setting could provide information not available from a theoretical discussion of cost allocation proposals. MCI argues that AT&T's Tariff 12 provides a good forum to test the manual because Tariff 12 is an attempt to offer "one-stop shopping" for AT&T customers. MCI further argues that the cost allocation results obtained from the limited implementation of AT&T's manual should be made part of the record in the Commission's ongoing investigation of Tariff 12.[9] AT&T responds that MCI's suggestion is outside the scope of this proceeding. AT&T also states that Tariff 12 services do not include non-regulated equipment or non-common carrier services.[10]

10. We decline to adopt MCI's suggestion. Limited implementation of AT&T's manual would require AT&T, for all its non-Tariff 12 activities, to reinstitute its Combined Activities Accounting Plan (CAAP), that governed accounting procedures for joint and common costs through December 31, 1987, and to adapt it to the new USOA. We believe that the cost allocation manual submitted by AT&T is far more comprehensive than the CAAP, and will better discourage cross subsidy of nonregulated activities. While we agree with MCI that actual allocation results will yield valuable information, we do not see the need to delay full implementation of the manual in order to test its results in a limited setting. Moreover, the setting MCI suggests would not provide a sufficient test of the proposed manual's ability to allocate costs between regulated and nonregulated activities. AT&T does not propose to bundle regulated and nonregulated offerings under Tariff 12. In fact, the Commission's interest in Tariff 12 is focused on the potential for cross subsidization between different regulated services.[11]

C. Affiliate Transactions

11. The *Joint Cost Order* establishes specific rules governing the provision of assets and services to and from affiliates. These rules were created in order to discourage carriers from circumventing the cost allocation rules. In the absence of the affiliate transaction rules, a carrier arguably could provide assets or services to or obtain assets and services from a separate, but affiliated, company in a manner that would allow nonregulated operations to bear less than fully distributed costs. The affiliate transactions rules specify the accounting valuation standards that will be applied in accounting for transactions between a carrier and its affiliates. Those rules vary depending upon whether the transaction involves assets or services.[12] The *Joint Cost Order* also required that carriers include in their cost allocation manuals "[a] statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms, and frequency of such transactions."[13]

12. Telenet argues that AT&T's manual violates the affiliate transaction rules by failing to require affiliates using AT&T's Accunet Packet Service (Accunet) to pay the tariff rate for certain transmission services that interconnect the Accunet packet switches. Telenet states that the Accunet service tariff permits Accunet customers -- whether independent parties or AT&T affiliates -- to obtain underlying transmission services at "embedded cost" instead of the higher, tariffed rate. Telenet states this is of concern because AT&T's affiliates are the principle users of Accunet. AT&T's affiliates are thus obtaining the underlying transmission services at a rate less than the tariffed rate, according to Telenet. Telenet requests that the Bureau require AT&T to reprice its Accunet service to recover the tariffed rates of the underlying transmission service.[14] In response, AT&T argues that Telenet's request has no relevance to the cost allocation manual proceeding and is an improper collateral attack on an Accunet tariff issue that has already been decided by the Commission.[15]

13. Telenet's arguments have previously been raised in connection with AT&T's Accunet tariff filing. A Bureau analysis of the Accunet rate levels and rate structure found that if AT&T were required to charge a rate for Accunet transmission comparable to the basic transmission tariff, there would have been a cumulative revenue shortfall of $200,000 after three years.[16] Consequently, we did not require AT&T to re-price the transmission component of its Accunet tariff, a result later confirmed by the Commission.[17] As part of our review of the Accunet tariff, however, we required AT&T to maintain separate accounting records for Accunet costs and revenues, and we ordered AT&T to submit reports that would enable us to determine if AT&T's projections for Accunet usage were confirmed by actual usage. Given that AT&T's affiliates must obtain Accunet service under tariff and that Telenet's arguments concerning the Accunet tariff have been previously explored, we find no reason to order changes in the manual or the Accunet tariff. AT&T Information Systems, Inc.'s (ATT-IS') use of Accunet does not violate our affiliate transaction rules.

14. We do have several concerns about AT&T's other proposals for affiliate transactions. First, AT&T has failed to provide sufficient information in its manual for us to determine if the transactions listed are in compliance with Commission rules. Although AT&T states that all of its transactions with affiliates are in compliance with the rules, the lack of detail concerning some of its affiliate relations renders it impossible for us to verify that conclusion. AT&T's manual does provide the nature, terms, and frequency of many of the transactions it lists. But in a number of instances, AT&T has failed to provide the terms of the transactions. In these instances, it appears that no prevailing price (*i. e.*, tariff rate or market price) is available. Apparently, AT&T intends either to allocate the cost pursuant to Section 64.901 if the transaction is a service, or, if the transaction involves an asset, to account for the transfer based on the higher or lower of fair market value and net book cost.[18] AT&T must revise its manual to make its proposals specific and explicit.

15. Second, AT&T's chart of corporate affiliates and its general description of its affiliate relationships are inconsistent.[19] As an initial matter, AT&T, by its own admission, has failed to provide a complete listing and description of its own affiliates.[20] In its revised manual, AT&T must provide full and complete disclosure of its affiliates. Moreover, AT&T's description of its affiliate relationships in Attachment B is not reflected in Attachment C containing the chart of corporate affiliations. For example, in Attachment B, AT&T states that AT&T Communications is "comprised" of AT&T Communications, Inc., the 24 interexchange companies, the Interstate Division of AT&T Company, and AT&T Communications' other subsidiaries. In Attachment C, however, the chart does not reflect these corporate relationships. AT&T must amend its manual to eliminate the ambiguities between these two sections. Finally, AT&T has admitted that its descriptions of affiliate transactions do not necessarily reflect the actual parties to the transactions.[21] AT&T must specify those transactions for which it serves as an intermediary on behalf of its interexchange companies.

16. Third, we are concerned that AT&T's presentation of its "combined activities" does not reflect the requirements of the *Joint Cost Order*. "Combined activities" are those in which AT&T affiliates work in conjunction with one another to provide a product or service to AT&T customers. To the extent that these combined activities require a nonregulated affiliate to provide a service or asset to, or receive a service or asset from, a regulated affiliate, the affiliate transaction rules apply. Accordingly, AT&T must provide the terms of the transactions that are involved in its provision of combined activities.

D. Employee Time Reporting

17. The *Joint Cost Order* permitted carriers to select from among several methods of recording employee time. The Commission reasoned that, since wages and salaries would serve as an important technique in the allocation of costs, it was important that carriers use accurate methods of recording employee time. The Commission further found that no one time reporting system would provide accurate results in all situations. Carriers therefore were free to propose the use of positive time reporting, exception time reporting, or time and motion studies.[22]

18. In its manual, AT&T discusses the various time reporting systems it will use and provides information concerning how time reporting will be monitored and enforced. In several resects, however, AT&T's proposals lack the detail we need to determine if AT&T will be in compliance with the Commission's requirements. First, although AT&T refers to different time reporting methodologies, it fails to describe the employees to whom the time reporting systems will apply. Absent this information, we cannot make a determination that AT&T's proposals are acceptable. AT&T also fails to describe the mechanics of how employees will report their time. Although it refers to a "mechanized time reporting system," AT&T does not explain the process or processes by which an employee would record work time. In order to evaluate fully AT&T's proposals for employee time reporting, AT&T must provide information concerning the employee groups subject to the various time reporting methods and the mechanics of how employee time is recorded.

19. AT&T also must clarify its proposals regarding nonproductive time. In its manual, AT&T states that it will use one of three methodologies to capture and allocate nonproductive time. The first method appears to employ AT&T's "mechanized" time reporting system to allocate costs for some full time reporting employees. According to the manual, nonproductive time will be applied "as a loading rate" to the employee's productive time. AT&T does not explain exactly how this process will work. Other full time reporting employees will identify nonproductive time in their time reports. Under this alternative method, nonproductive time will be allocated in the same proportion as time that was positively recorded for regulated and nonregulated purposes. AT&T, however, does not explain which employees will be subject to which type of nonproductive time allocation methods. Finally, AT&T states that the nonproductive time of exception time employees will be "collected in the Company's payroll system." Again, AT&T does not explain how this will be done. We require AT&T to revise its manual to address these omissions.

E. Nonregulated Activities

20. AT&T's manual lists eleven nonregulated activities that it describes as "non-common carrier" services, in addition to the combined services that are listed in the affiliate transaction section of its manual. AT&T also provides a brief description of each service. Some of the services are enhanced services that involve use of the telecommunications network. Other nonregulated activities do not directly involve use of the telecommunications network.

21. In order to audit and monitor AT&T's cost allocations properly, our staff and the independent auditors must be readily able to discern which of AT&T's list of enhanced services involves the use of network plant, and particularly, joint use of network plant. At this time, however, we do not wish to require AT&T to cross reference its nonregulated activities to USOA accounts. Instead, we require AT&T to describe briefly the basic configuration of enhanced services it provides. The description must include whether the service is being provided through a device separate from the network or part of it. If offered via network plant, the description should identify the plant providing the service. For example, AT&T's description of subaccount billing must state that the service is offered by the network's Traffic Service Position System to its MTS customers. Describing the basic configuration of the system should not prove to be burdensome to AT&T, and will greatly simplify the job of auditing and monitoring AT&T's joint use of network plant. AT&T must, therefore, amend its description of its nonregulated activities to include this information for its enhanced services.

F. Incidental Activities

22. AT&T's manual also provides, as required, a list of nonregulated activities that are offered on an incidental basis by regulated affiliates. In the *Joint Cost Order*, carriers were permitted to account for incidental activities as if they were regulated, provided that the activities meet the following quantitative and qualitative tests: (a) the activity must be an outgrowth of regulated operations; (b) it cannot constitute a separate line of business; (c) it must have traditionally been treated as incidental for accounting purposes; and (d) the total of all incidental activities must not exceed one percent of a carrier's total revenues.[23]

23. In its manual, AT&T states that all of its incidental activities meet the criteria of the *Joint Cost Order*. AT&T then provides a lengthy list of incidental activities, including those activities that arise from its normal business operations, its domestic telecommunications services, its international telecommunications services, its customer coordination and support activities, as well as several "miscellaneous" incidental activities. Although AT&T briefly describes each of these activities, it does not attempt to justify why each of the activities listed qualifies under the Commission's criteria. As a result, we are not able to reach a determination that each activity has correctly been labeled as incidental. We therefore direct AT&T to amend its manual to provide the required justification. We are particularly concerned that the activities listed constitute outgrowths of regulated operations, and are not separate lines of business.

III. ACCOUNT-BY-ACCOUNT ANALYSIS

24. AT&T's manual describes in narrative form the methods it proposes to use to allocate costs between regulated and nonregulated activities. AT&T initially discusses the general principles it purports to apply to cost allocations, and then provides specific proposals on an account-by-account basis. In reviewing the manual, we have discovered numerous instances in which AT&T's cost allocation proposals are vague, ambiguous, or appear to violate Commission requirements. Some problems affect only one account, while others are more universal. Before reviewing the individual accounts, we will address the more general issues concerning AT&T's cost allocation proposals.

A. Accounting Procedures

25. The *Joint Cost Order* requires carriers to account for their nonregulated activities as part of their regulated books of account whenever a nonregulated activity utilizes assets or resources in common with regulated activities.[24] Carriers must account for nonregulated activities that do not use common assets or resources in a separate set of books consistent with instructions provided in USOA Accounts 1406 (Nonregulated investments) and 7990 (Nonregulated net income). Ad Hoc raises two issues relating to AT&T's compliance with these accounting procedures.

26. *Nonregulated accounts*. First, Ad Hoc cites a statement in the AT&T manual referring to the existence of nonregulated accounts that AT&T says it will use to record the costs of preemptively deregulated activities and activities not previously regulated. According to Ad Hoc, AT&T does not identify these nonregulated accounts. Ad Hoc argues that the costs recorded in these unidentified nonregulated accounts may have a causational relationship with costs recorded on the regulated books, and that by failing to identify these nonregulated accounts, AT&T may be underallocating costs that are recorded in its regulated books. Ad Hoc states that the Bureau should require carriers to identify all investments and expenses in their cost manuals, regardless of how the costs are booked.[25]

27. In response, AT&T argues that the nonregulated accounts are identified and described in the Commission's USOA as accounts 1406 and 7990. AT&T further argues that there is no potential for misallocation of nonregulated costs since the Commission's rules require that costs booked to these accounts must be "dedicated to a nonregulated activity." In addition, AT&T states that the examples cited by Ad Hoc of situations in which a nonregulated account should drive the allocation of a regulated account are all situations involving joint or common use of assets and resources that by definition must be recorded in the regulated books.[26]

28. We disagree with Ad Hoc's argument. The Commission's rules clearly state that a nonregulated activity's costs shall be booked to separate nonregulated books only in those cases where the nonregulated activity does not employ assets or resources in common with regulated operations. To use an example given by Ad Hoc, if a nonregulated marketing enterprise were supervised by managers that also supervised regulated operations, the nonregulated marketing enterprise would share resources in common with regulated operations -- the managers. As a result, the costs of the marketing enterprise would have to be recorded in the regulated books of account. In the event there are no assets or resources in common with regulated operations, carriers are required to maintain separate books of account. There is no need, however, to require the inclusion of these additional accounts in the cost manuals where there are no costs to be apportioned to regulated activities.

29. *Transaction services*. Ad Hoc also argues that AT&T's manual fails to provide for the allocation of costs associated with AT&T's proposed transaction services.[27] According to Ad Hoc, it is impossible to determine from AT&T's manual where investment for these services would be booked. Ad Hoc provides several possible accounts for recording the costs of transaction services, but argues that each of these is deficient in some respects.[28]

30. In response, AT&T argues that the investment used to provide transaction services has been, and will continue to be, owned by AT&T-IS. According to AT&T, its proposal before the Commission is limited to co-locating the equipment used to provide transaction services in AT&T central offices. AT&T states that the rental of space by AT&T-IS is governed by the affiliate transaction rules, and that none of the costs associated with transaction services needs to be recorded in regulated books of account or apportioned pursuant to its cost allocation proposals.[29]

31. We believe that Ad Hoc's criticism of the AT&T manual is unwarranted. For example, if a computer used to provide transactions services is owned by AT&T-IS, and AT&T-IS pays rent for its use of the central office, then the costs associated with the services should not appear on the regulated books of account. If the computer are owned by AT&T and is separate from the network's computers, then the transaction services computer should be booked as a general purpose computer. If transaction services are provided via the central office computer itself, then its costs should be booked in the switching account. While the latter two hypotheticals might require an amendment to AT&T's cost manual, we will not order such changes until the configuration of the service is known and the Commission authorizes AT&T's transaction services proposal. At that time, AT&T is required to amend its manual to allocate the cost of transaction services pursuant to the Commission's rules if such a change is warranted. We perceive none of the ambiguity that Ad Hoc suggests is present, except to the extent that the transaction services proposal remains pending.

B. General and Marketing Allocators

32. The *Joint Cost Order* states that costs that cannot be directly assigned or attributed shall be allocated based on a general allocator computed by using the ratio of all non-marketing expenses directly assigned or attributed to regulated and nonregulated activities.[30] In adopting the general allocator, the Commission determined that carriers must attempt to maximize the assignment or attribution of costs, employing the general allocator only when a more direct measure of cost causation is unavailable.[31] The Commission also decided that the expenses associated with marketing warranted treatment different from that given to investment-related expenses, since marketing expenses are likely to benefit nonregulated activities to a disproportionately high degree. Accordingly, the Commission found that marketing expenses that cannot be directly assigned or attributed must be allocated based on a marketing allocator computed by using the ratio of all marketing expenses directly assigned or attributed to regulated and nonregulated activities.[32]

33. Contrary to this determination, AT&T states in its manual that when residual costs are associated with a particular activity, the general allocator or the marketing allocator to be applied will be derived only from those expenses relating to that particular activity.[33] AT&T's manual appears to formulate and apply the general and marketing allocators in a manner inconsistent with the *Joint Cost Order*. When a cost cannot be directly assigned or attributed, the Commission's cost allocation standards require carriers to apply the general allocator or the marketing allocator. The sole exception to this result is a cost that represents joint or shared use of network plant, which is subject to forecasting. The Commission did not authorize carriers to develop a series of general allocators or marketing allocators related to particular activities. There is only one general allocator and one marketing allocator to be applied, and these are based on the ratio of all expenses (except marketing) or all marketing expenses that are assigned or attributed. We, therefore, require AT&T to amend its references to the general and marketing allocators to reflect the Commission's requirements.

34. In addition, we are concerned that AT&T has not followed the Commission's directives to maximize assignment or attribution of costs, and to employ the general allocator only when more direct measures of cost causation are unavailable. AT&T's manual employs the general allocator for many accounts and cost pools, often without any attempt to directly assign or attribute costs first. With the exception of one cost pool, AT&T proposes to allocate all of the 67XX series of accounts[34] based on the general or marketing allocator. Numerous other accounts and cost pools also would be allocated based on the general or marketing allocators. The problem with extensive reliance on these allocators is that there are relatively fewer expenses available to be directly assigned or attributed, enhancing the possibility that the general or marketing allocators will reflect only a small portion of a carrier's activities. The Commission's intention in creating these allocators, however, was to reflect to the greatest extent possible, the universe of expenses incurred by a carrier. In light of our concerns, we require AT&T to amend its cost allocation proposals to employ the general and marketing allocators only where more direct measures of cost causation are not available. If AT&T decides to retain its use of the general or marketing allocator, it must justify in detail, as part of its revised manual, why direct assignment, direct attribution or indirect attribution cannot be employed.

C. Apportionment Methodology

35. Closely related to AT&T's overreliance on the general and marketing allocators are two problems relating to AT&T's overall approach to cost allocations. The first concerns AT&T's design of its cost pools, while the second concerns a general absence of direct assignment of costs. These problems are interrelated because the relatively few number of cost pools AT&T establishes contributes to its inability to assign costs directly.

36. The Commission requires costs to be collected into homogeneous pools or categories in order to facilitate their allocation. The *Joint Cost Order* requires that the level of detail reflected in the selection of cost categories should be governed by the extent of the carrier's involvement in nonregulated activities. In addition, the number of categories employed is also dictated by the costs of developing additional cost pools, as well as a determination of whether additional pools would contribute to the accuracy of the allocations. The Commission also stated that in determining the number of cost pools, carriers should attach some importance to the need for a relatively stable group of cost pools that can be administered over a lengthy period of time.[35] Moreover, cost pool structures must be more detailed than USOA accounts, because USOA accounts often reflect more than one function, and would therefore require the application of several of the cost allocation principles.[36]

37. For the most part, AT&T has taken a different approach in its manual. Rather than identify homogeneous groupings of costs, in many cases AT&T has simply used the USOA account as proposed cost pools. While this approach is perfectly consistent with Commission requirements for accounts that are directly assigned in their entirety to regulated or nonregulated activities, AT&T's general failure to identify cost pools within other accounts means that many costs may not be allocated with the greatest available degree of precision.

38. In revising its manual, AT&T must amend its cost pool structure to reflect Commission requirements. In each case in which AT&T has failed to identify homogeneous categories of costs within USOA accounts that are not being directly assigned in their entirety to regulated or nonregulated activities, we require AT&T to revise its cost pool structure to directly assign and/or attribute at least some of the costs. In the event AT&T decides not to create additional cost pools, we require AT&T to justify in detail as part of its revised manual why additional cost pools would not contribute to the accuracy of the allocation. In making its determinations, AT&T should take into consideration the additional expense involved in administering additional cost pools.

D. Undefined Terminology

39. Although AT&T makes some attempt to define the terminology it uses in its manual, we find that in two instances, its efforts have fallen short. First, throughout its manual, AT&T misuses the word "assignment" as a synonym for allocation or apportionment.[37] The Commission, however, has specifically defined these terms, and distinguished between them, in order to avoid the inevitable confusion that would arise if their definitions were not

precisely drawn. In the *Joint Cost Order*, the Commission stated that "assign or "directly assign" should be employed when a cost, or group of costs, belongs to only one jurisdiction or service. "Allocate" is used to describe costs that must be divided between two jurisdictions or services. "Apportion is a term that encompasses both assignment and allocation.[38] "Attribution refers to an allocation methodology that is employed if direct assignment is not possible, and requires the existence of a cost causative linkage between the cost and its allocation bases.[39] By confusing these terms, AT&T has introduced a degree of ambiguity into its manual that cannot be tolerated. We cannot permit AT&T or any other carriers to create an entirely new set of definitions to terms of art that are critical to an understanding of the cost allocation proposals. We therefore require AT&T to amend its manual to apply the terms as defined by the Commission.

40. AT&T has also made use of a particular phrase that must be defined more specifically. Throughout its cost allocation proposals, AT&T states that various costs will be allocated "based on accounting records." In the introduction to its cost allocation proposals, AT&T states that accounting records can mean any number of things, including functional accounting codes, continuing property records, tax records, lease records, and responsibility codes. In order to form a judgment that the cost allocation proposals in AT&T's manual are reasonable, we must have a clear idea of the methodology that AT&T will use. Simply stating that "accounting records" will form the basis of the allocation is insufficient. AT&T must specify which accounting records it will employ in each case. We require AT&T to amend its manual accordingly.

E. Accounts To Be Added

41. In the *Joint Cost Order*, the Commission required that carriers submit cost allocation proposals for each USOA account and subaccount.[40] If this requirement were interpreted literally, however, it would have mandated the allocation of USOA accounts that are unrelated to measures of a carrier's costs and revenues. Therefore, in the *Automated Reporting Requirements Order*, the Commission listed the accounts that would be subject to the *Joint Cost* reporting requirement.[41]

42. Since the release of these orders, we have had an opportunity to consider several additional accounts that must be allocated in order for us to track carriers' cost allocations. In addition, our *Rate Base Order* specifies certain USOA accounts that do not have to be allocated.[42] Consequently, in amending its manual, AT&T must submit cost allocation proposals for all of the accounts listed in the *Automated Reporting Requirements Order* except for the 11XX series of accounts. AT&T must also include in its manual the following six accounts not named in the *Automated Reporting Requirements Order* : Account 1439, Deferred Charges; Account 2004, Telecommunications Plant Under Construction - Long Term; Account 4120, Other Accrued Liabilities; Account 4360, Other Deferred Credits; Account 5050, Customer Premises Revenue; and Account 7150, Gains and Losses from Disposition of Land and Art Works. While AT&T has provided for Accounts 1439, 2004, and 7150, in its revised manual it must provide for the other three accounts as well.

F. Account-by-Account Analysis

Account 1220 - Material and Supplies

43. AT&T creates two cost pools for this account. One pool, "Property Held for Sale or Lease" is directly assigned to nonregulated activities. AT&T must clarify in its manual that all of its property held for sale or lease is only related to nonregulated activities.

Account 2002 - Property Held for Future Telecommunication Use

44. AT&T establishes an unnamed number of cost pools in this account that are each allocated based on the allocation of the corresponding plant-in-service accounts. We require AT&T to list each of its cost pools, as the Commission mandated in the *Joint Cost Order*, and the proposed allocation basis for each.[43]

Account 2003 - Telecommunications Plant Under Construction - Short Term and Account 2004 - Telecommunications Plant Under Construction - Long Term

45. In the AT&T manual, these two accounts are presented together, and would be allocated using the identical allocation methodology. It is not clear from AT&T's presentation whether two sets of cost pools would be created, one for each account. Cost pools must be composed of homogeneous costs, and cannot be drawn from two different USOA accounts without our express approval. Accordingly, we require AT&T to discuss the allocation methods for these two accounts separately in its revised manual and to create two sets of cost pools, one for each account.

Account 2005 - Telecommunications Plant Adjustment

46. AT&T has proposed to create a series of cost pools for this account that correspond to the plant-in-service accounts underlying the adjustment. These cost pools would be allocated based on the corresponding plant accounts. Given the relatively few number of entries in this account, we believe a better method of allocating adjustment amounts is to analyze individually the transactions giving rise to the adjustment. This methodology should impose little burden on AT&T and will provide more precise allocation results.

Account 2112 - Motor Vehicles

47. AT&T proposes two cost pools for this account. One pool, for automobiles and van pools, would be allocated based on total wages and salaries. The other pool, for trucks, would be allocated based on wages and salaries in plant-related expense accounts. By basing the allocation of automobiles and van pools on total wages and salaries, AT&T's proposal may ignore disproportionate use of these vehicles by certain groups of employees that may have a bearing on whether the vehicles are used for regulated or nonregulated purposes. As a result, AT&T's proposal is not sufficiently cost causative. In its revised manual, AT&T shall either propose an allocation method for this cost pool based on proportionate use of automobiles or van pools or show why such a method should not be mandated.

48. In amending its treatment of motor vehicle investment, AT&T should consider changing its cost pool structure to reflect the functionality of the vehicles it is

allocating, instead of basing its cost pools on body type or model. By amending its cost pool structure, AT&T may find that it can develop allocation methodologies that more accurately reflect cost causation.

Account 2113 - Aircraft

49. AT&T establishes one cost pool for this account that is allocated based on the general allocator. The Commission has stated that the general allocator should be used only if a more cost causative allocator is unavailable or impractical.[44] We believe AT&T can use specific records or logs to directly assign at least some of the costs of this account. We therefore require it to develop a different allocation mechanism.

Account 2121 - Buildings

50. AT&T establishes three cost pools for this account. They consist of "Administrative and Other," "Housing Operating Equipment," and "Towers." While we have no objection to the cost pools that have been created, we do not believe that the apportionment methodology maximizes direct assignment of costs, as required in the *Joint Cost Order*. Accordingly, we require AT&T to modify its proposal for this account. In doing so, it must also provide for a cost pool that identifies the cost of building space that is rented to others. These costs may be directly assigned to regulated activities when they are incidental, or directly assigned to nonregulated when they are the result of a nonregulated activity.

Account 2122 - Furniture

51. AT&T proposes a single cost pool for this account. The cost pool would be allocated based on the wages and salaries in Accounts 6611 through 6728. AT&T's proposal appears to ignore the probable uses of investment in this account by employees not associated with sales, marketing, executive, legal, and other administrative functions. We direct AT&T to justify or amend its proposed allocation method.[45]

Account 2124 - General Purpose Computers

52. AT&T proposes two cost pools for this account. One of the pools, "General Administration Information Computers," would be allocated pursuant to the general allocator. We believe that more cost causative allocation methods are available for this investment. Accordingly, we direct AT&T to amend its treatment of this account to avoid use of the general allocator or to justify in detail why the general allocator should be permitted.

Account 2211 - Analog Electronic Switching ; Account 2212 - Digital Electronic Switching ; and Account 2215 - Electromechanical Switching

53. AT&T proposes to allocate each of these accounts using an identical methodology. AT&T would assign some of the costs in these accounts directly to regulated or nonregulated activities. AT&T would also create one cost pool for joint use of switching equipment. Finally, AT&T would create a "residual" cost pool for equipment that is not apportioned to any of the previous cost pools. AT&T's joint use pool would be allocated between regulated and nonregulated activities based on a forecast of "message minutes," which represent an adjustment of "conversation minutes" as defined in Part 36 of the Commission's rules to include non-conversation time. The residual pool would be allocated based on "investment previously assigned.

54. Ad Hoc argues that AT&T's proposed allocation methodology is too vague. According to Ad Hoc, AT&T's failure to create cost pools that reflect the variety of equipment included in the USOA switching accounts will make it impossible to determine whether the costs of these various types of equipment have been properly allocated.[46] Ad Hoc also questions AT&T's use of a residual cost pool. Ad Hoc argues that it is not clear what equipment would be included in such a cost pool given the overall cost pool structure for the accounts. Ad Hoc also objects to AT&T's method for allocating the residual pool based on costs directly assigned to regulated or nonregulated activities. Ad Hoc argues that, if there is a residual pool, its costs ought to be allocated based on costs directly assigned or allocated.[47]

55. AT&T replies that Ad Hoc's argument is based on an apparent misunderstanding of Part 32 accounting, that includes peripheral and testing equipment within the associated switching accounts. AT&T also states that the equipment included in the residual cost pool would be equipment that is held for immediate use, but not yet in service. According to AT&T, this equipment, such as plug-ins and replacement parts, is booked to the plant accounts pursuant to the Commission's accounting rules. AT&T also explains that its use of the word "assign" in this case included costs to be allocated, as well.[48]

56. As we understand Ad Hoc's argument, its concern with AT&T's central office switching accounts is that AT&T's cost pools fail to separate homogeneous types of costs within the central office, thereby obscuring attempts to monitor cost allocations to ensure that results reflect usage of the various kinds of equipment. We have previously discussed AT&T's failure to develop cost pool structures that are responsive to the Commission's requirements. In general, whenever there are allocations to be made between regulated and nonregulated activities, the cost pools must reflect an attempt to maximize the assignment or attribution of costs. For plant accounts, we would expect investment to be separated by type and function if such a separation would maximize assignment or attribution of the investment.

57. We are not convinced, however, that AT&T's switches, and particularly its electromechanical switches, are involved in nonregulated usage that would at present warrant the more detailed type of cost pool structure that we would otherwise require. We have examined AT&T's list of nonregulated activities to determine whether any of them involve nonregulated usage of the switches. While some services involve protocol processing, on previous occasions AT&T has stated that the protocol processing component of these services is offered through computers that are separate from the network, in some cases by computers owned by AT&T affiliates.[49] Thus, based on these statements, it appears that the investment in these three accounts is devoted entirely to regulated operations.

58. In its manual, however, AT&T has provided for nonregulated use of all three switching technologies. We are not certain if AT&T intends its proposed allocations to be hypothetical, or if it has changed the configurations of the enhanced services previously authorized. In revisions to its manual, AT&T is directed to clarify its proposals for this account. If enhanced services are sharing switching investment, AT&T must specify in its cost pool structure

what components of the three switching accounts are being shared and for which enhanced service. In the event its allocation proposals are hypothetical, we direct AT&T to revise its manual to reflect its current, authorized enhanced services. Should AT&T seek to introduce an enhanced service that requires shared use of its basic network switch investment, we require it to amend its manual to reflect the shared use at that time. By reviewing such cost revisions in conjunction with the specific CEI plans required of AT&T by our *Computer III* rules,[50] we will be in a better position to assess the concrete effects of its proposed accounting procedures.

59. In addition, we also direct AT&T to specify in its manual the costs it is including in the residual cost pool. Moreover, in Section II, D., below, we have directed AT&T to amend its manual to reflect the correct use of the word "assign." We believe that these amendments will be responsive to Ad Hoc's concerns about the residual cost pool.

Account 2220 - Operator Systems and Account 2231 - Radio Systems

60. As in the case of its central office switches, AT&T proposes to allocate these accounts based on forecasts of usage. For Operator Systems, AT&T divides the account into two cost pools. The "Stored Program Control cost pool would be allocated based on forecasted milliseconds of use, which AT&T states refers to "the relative processor real time" as used in Part 36 of the Commission's rules. The "Position Subsystem and Other" cost pool would be allocated based on weighted standard work seconds, as provided in Part 36 of the Commission's rules. The radio systems account is also divided into two cost pools. The "Satellite and Earth Station Facilities" cost pool is allocated based on "forecasted satellite circuits" and the "Other Radio Facilities" is allocated based on "forecasted circuit miles.

61. With the exception of the "Position Subsystem and Other" cost pool in Account 2220, we have been unable to determine that there is any shared use of network plant in these two accounts that requires forecasting, given AT&T's current list of nonregulated activities. While AT&T's provision of subaccount billing shares the use of the traffic service position systems equipment in Account 2220, no other nonregulated services exist that appear to share the investment in these accounts. AT&T's cost apportionment methodology, therefore, appears to be hypothetical. In revising its manual, we require AT&T to review these accounts and present apportionment methodologies that reflect AT&T's current enhanced activities.

Account 2232 - Circuit Equipment and Accounts 2411 to 2441 - Outside Plant

62. AT&T divides its circuit equipment account into two cost pools, one for "Terminal Investment" and one for "Line Haul Investment." AT&T treats both of these cost pools, as well as all of the outside plant accounts, as if they represent shared network investment-- *i. e.*, it provides for a forecasted measure of usage to allocate the costs in these accounts.

63. Ad Hoc argues that AT&T's proposal to allocate costs based on the forecasted nonregulated measure of use compared to the total forecasted measure of use would result in an underallocation of nonregulated costs. According to Ad Hoc, at least some of the investment in these accounts must be jointly used. In the case of the terminal cost pool in Account 2232, Ad Hoc states that AT&T's proposal to use forecasted circuit terminations fails to consider the possibility that some circuit terminations may be used by both regulated and nonregulated activities.[51] AT&T responds that its proposed allocation methodology reflects joint use of the network plant in question because the allocation will be based on forecasted circuit capacity, whether measured in terminations or miles. Use of forecasted capacity takes into account both dedicated circuits and jointly-used circuits, according to AT&T.[52]

64. The allocation methodology proposed by AT&T for these accounts presumes that there is some shared use of the investment. Based on our review of AT&T's list of nonregulated activities, however, it appears that any circuit equipment or outside plant accounts used in the provision of a nonregulated service would be obtained under tariff. As it has with its other network plant accounts, AT&T appears to be providing a hypothetical allocation based on nonregulated services that do not yet exist. AT&T must amend its manual to provide for forecasted allocations only in those cases of shared network plant. Given this finding, for the present, we will not respond to Ad Hoc's criticisms of AT&T's hypothetical allocations.

Account 2362 - Other Terminal Equipment

65. AT&T proposes a single cost pool for this account. Costs would be allocated in the same proportion as the current use of the "Terminal Investment" cost pool investment in Account 2232 - Circuit Equipment. We require AT&T, in revisions to its manual, to justify the cost causational link between this account and the "Terminal Investment" cost pool in Account 2232 or to amend its apportionment proposal for Account 2362. Furthermore, if AT&T amends its treatment of Account 2232 in response to the concerns we have expressed regarding that proposal, the apportionment proposal for Account 2362 must necessarily change.

Account 2681 - Capital Leases

66. AT&T proposes that this account be divided into a unspecified number of cost pools to be allocated based on the allocation of "similar investment" in assets that are owned. While we have no objection to AT&T's cost allocation methodology, we require AT&T to specify all of the cost pools it will create for this account and the allocation methodology for each.

Account 2682 - Leasehold Improvements

67. AT&T proposes to treat this account as a single cost pool, allocated based on the relative regulated and nonregulated split of two cost pools in different accounts--the "Operating Rents" cost pool in Account 6121 (Land and Building Expense) and the "Amortization Expense - Capital Leases cost pool in Account 6563 (Amortization Expense - Tangible). We require AT&T to amend its proposed allocation methodology to reflect the fact that operating rents and operating leases may not have any cost causational connection to leasehold improvements.

Account 3410 - Accumulated Amortization - Capital Leases

68. AT&T proposes to create an unspecified number of cost pools for this account, and to allocate these pools based on related cost pools for Account 2681 - Capital Leases. While we have no objection to AT&T's proposed allocation method, we require AT&T to specify all of the cost pools it will create for this account and the allocation methods for each.

Account 4040 - Customers' Deposits

69. AT&T proposes to treat this account as a single cost pool. AT&T states that it will allocate the pool "based on the nature of the customer account detail for which the deposits were required." We require AT&T to clarify its proposal. We are uncertain from the brief explanation given if AT&T intends to examine each and every deposit placed with it in order to make the allocation. In its revised manual, AT&T must provide specific information concerning the allocation of this account.

Account 4100 - Net Current Deferred Operating Income Taxes and Account 4340 - Net Noncurrent Deferred Operating Income Taxes

70. For each of these accounts, AT&T has proposed to create an unspecified number of cost pools based on "the type of tax timing difference . . . as identified by accounting records." The cost pools would be allocated between regulated and nonregulated activities in the same proportion "as the allocation of the asset or expense amounts that gave rise to the tax timing difference." We find that AT&T's proposal is overly vague. While we agree that both accounts should be apportioned using identical methodology, AT&T must be more specific about the cost pools and the basis for allocation of each account.

Account 6112 - Motor Vehicle Expense

71. AT&T proposes to create a single cost pool for this account, to be allocated based on "total wages and salaries." AT&T has not attempted to justify why total wages and salaries would be a better indicator of motor vehicle expense than the related investment account. In its revised manual, AT&T must amend the allocation factor for Account 6112 to base it on the relative allocation of Account 2112.

Account 6113 - Aircraft Expense

72. AT&T proposes to use the general allocator for this account. As we stated in regard to the related investment account, the general allocator should be employed only if a more cost causative allocator is unavailable or impractical. Since we have directed AT&T to develop a more cost causative allocator for its related investment account, we believe that the allocation of aircraft expenses should be based on the related investment. We direct AT&T to amend its manual accordingly.

Account 6121 - Land and Buildings Expense

73. AT&T proposes to divide this account into three cost pools. The "Operating Rents - Plant Related" cost pool would be allocated based on central office investment. The "Operating Rents - Administrative" cost pool would be allocated based on wages and salaries recorded in Accounts 6611 through 6728. The "Other" cost pool would be allocated based on AT&T's investment in land and buildings. We do not believe that investment owned by the carrier is necessarily the most cost causative method of allocating a rental expense. AT&T must amend its proposal to incorporate a more cost causative allocator, such as relative use of the land or buildings that are rented.

Account 6124 - General Purpose Computers Expense

74. AT&T proposes to create two cost pools for this account that parallel the cost pools proposed for the related investment accounts. One pool, "General Administration Information Computers," is allocated based on the general allocator. As we have previously stated, the *Joint Cost Order* requires carriers to minimize their use of the general allocator in allocating costs between regulated and nonregulated activities. We therefore direct AT&T to amend its treatment of this cost pool, and to allocate the cost included in the pool based on the related cost pool in Account 2124.

Account 6534 - Plant Operations Administrative Expense and Account 6535 - Engineering Expense

75. For both of these accounts, AT&T establishes cost pools that would be allocated based on related investment accounts. For example, the land and buildings cost pool for Account 6534 would be allocated based on the allocation of the land and building investment accounts.

76. AT&T's proposals assume that the plant operations administration and engineering expenses bear a causal relationship to the current use of various investment accounts. We do not believe this is necessarily the case. We also believe that more direct measures of cost causation are available that might better reflect regulated and nonregulated expenses in these accounts. Wages and salaries of employees engaged in plant administration and engineering may measure relative regulated and nonregulated activity in these accounts more directly than attributing these types of expenses to investment. In its revised manual, AT&T must amend its treatment of these accounts to provide for more direct cost allocation mechanisms, or justify in detail why its present proposal is the most cost causative method available.

77. In addition to these concerns, we also have two questions regarding the cost pool structures for these accounts. First, in Account 6534, AT&T has proposed a "facility engineering" cost pool. AT&T is directed to clarify why an engineering cost pool should be included in an account that reflects plant operations administration expense, instead of Account 6535 - Engineering. Second, among the four cost pools AT&T has proposed for Account 6535, two pools appear to be similar, if not identical. The cost pools for "facility engineering" and "network plant," although allocated in slightly different ways, both appear to include the costs of engineering network plant. We direct AT&T to explain the difference between these cost pools or to delete one of the pools if they reflect the same costs.

Account 6540 - Access Expense

78. AT&T proposes to divide this account into two cost pools. The "switched access" pool would be allocated based on nonregulated access minutes of use "multiplied" by access rates. The "special access" pool would be allocated based on the ratio of nonregulated circuits to total circuits. The proposed allocation of regulated and nonregulated access expense appears to be based on the hypothetical existence of a nonregulated service that requires switched or special access. We have previously discussed problems with including hypothetical allocations in the manuals. If AT&T now has no nonregulated activities to which access expenses would be allocated, it should not include the hypothetical allocation procedure.

Account 6561 - Depreciation Expense - Telecommunications Plant in Service

79. AT&T proposes to create cost pools based on each network plant account, but it does not list or specify the pools, as required in the *Joint Cost Order*. AT&T must list each cost pool it is creating, and the allocation method for each.

Account 6611 - Product Management Expense

80. AT&T proposes to divide this account into two cost pools. The first pool, "Direct Product Management," will be directly assigned to regulated or nonregulated activities where possible. The residual amount in this pool would be allocated based on a "product management work study. The second pool, "Product Management Services Support," is allocated based on the allocation of the first pool.

81. We have several problems with the proposed allocation methodology for this account. First, the cost pool structure is confusing and fails to meet Commission requirements. AT&T describes the first pool as including the cost of "product and service identifications and specifications, market planning, and competitive analysis." The second pool contains "pricing support and economic and demand analysis." AT&T makes no attempt to distinguish these two sets of costs or to explain the difference between "competitive analysis" in the first cost pool and "economic and demand analysis" in the second cost pool. In revisions to its manual, AT&T must distinguish between the cost pools proposed for this account.

82. We also direct AT&T to create separate cost pools for costs that are assigned or allocated differently. For example, AT&T's proposal for its "Direct Product Management" cost pool presently contains two methodologies--some costs are directly assigned, while other costs are allocated pursuant to a study. The *Joint Cost Order* requires that costs be grouped together in homogeneous cost pools or categories. AT&T must therefore create separate pools for cost that will be directly assigned and allocated, and for those costs that are allocated, different pools for costs allocated based on different factors.

83. Second, AT&T's proposal to use a "product management work study" to allocate the residual portion of the "Direct Product Management cost pool is vague. AT&T states that the studies will employ the "functional analyses of each organization and its expenses." The "analyses" are conducted at least annually, AT&T states. As an initial matter, it is not clear what organizations AT&T is referring to in its description of work studies. Presumably, more than one AT&T entity subject to the manual has responsibility for product management, and the costs associated with these managerial efforts varies sufficiently to require different studies. AT&T must be more specific about the organizations to which it refers, and describe the responsibilities of each organization.

84. Moreover, an annual analysis of the residual costs associated with product management is insufficient. Depending upon the timing of the study and the initiation of a new product, costs that should be allocated to regulated or nonregulated may well be misallocated based on outdated functional analysis. Finally, the methodology proposed by AT&T ignores the very real possibility that the product it is managing is one that shares network plant. While AT&T assumes it can assign or allocate, via a study, all costs to regulated or nonregulated activities, we believe that some product management costs may constitute common expenses.[53]

85. The problems we have identified with AT&T's proposed study, and its overall allocation proposals for this account, compel us to require AT&T to develop a different allocation method for product management expenses. In developing a revised proposal, AT&T must pay close attention to its cost pool structure in order to ensure that its cost pools are homogeneous. Furthermore, AT&T must develop a method that recognizes the joint and common costs associated with some products. We also believe that AT&T's proposal to conduct functional analyses of product management is fundamentally flawed. AT&T should consider an alternative methodology, such as time and expense reporting, in developing its revised manual.

Account 6612 - Sales Expense

86. AT&T states that it will employ time reporting techniques and "other measures" of resources to "assign" costs. Resources that are identified by time reporting will be directly assigned to regulated or nonregulated activities, or allocated based on directly assigned costs, according to AT&T. Costs that are not assigned or allocated based on time reporting will be allocated via "other measures." Any residual cost would be allocated pursuant to the marketing allocator, AT&T states.

87. We have identified several problems with AT&T's proposal. First, AT&T fails to identify clearly its cost pool proposals for this account. Homogeneous cost pools must be identified in the manual. Second, AT&T fails to identify its allocation proposals for costs that cannot be identified with time reporting. In order to judge AT&T's cost allocation proposals, we must have a thorough understanding of how costs are to be allocated. Third, if AT&T intends to use studies as part of its "other measures" to identify cost pools or allocate cost pools between regulated and nonregulated activities, AT&T must disclose sufficient information about the studies to ensure that they are both statistically valid and reliable. AT&T must also disclose the frequency of studies. Finally, AT&T, in its revised manual, must demonstrate that more cost causative allocation methods are not available for its residual cost pool.

Account 6613 - Product Advertising

88. AT&T states it will directly assign these costs where possible and allocate the residual based on the marketing allocator. In its revised manual, AT&T must specify what cost pools it is creating for this account. We also require AT&T to justify its use of the marketing allocator.

Account 6621 - Call Completion Services

89. AT&T proposes to allocate the cost of this account using "weighted standard work seconds," as defined in Part 36 of the Commission's rules. As in the case of access expense, allocation of call completion services depends upon the existence of a nonregulated service that requires call completion assistance. No such service presently exists. We therefore require AT&T to amend its manual to assign these costs to regulated activities.

Account 6622 - Number Services

90. AT&T proposes to divide this account into two cost pools, one for "Directory Assistance" and one for "Directory Listings." The first cost pool would be allocated based upon the relative work time "as calculated by multiplying the number of regulated and nonregulated messages handled by the weighted standard work seconds for specific work functions." The second cost pool would be directly assigned to regulated activities.

91. AT&T's proposed allocation methodology must be amended. Once again AT&T apparently has proposed a hypothetical allocation between regulated and nonregulated activities. If AT&T now has no nonregulated activities to which these expenses would be allocated, it should not include the hypothetical allocation procedure.

Account 6623 - Customer Services

92. AT&T proposes to divide this account into three cost pools: "Commercial Operations," "Customer Accounting," and "Other." The "Commercial Operations" cost pool would be subdivided into four "sub-pools": service order processing, account inquiry, credit, and collection. AT&T provides different allocation bases for each sub-pool. AT&T also provides for different allocation bases in the event two or more of these functions are performed by the same group. We have several questions about these proposals.

93. First, AT&T's "sub-cost pools" within its "Commercial Operations" cost pool fail to conform to Commission requirements that cost pools be homogeneous in nature. The subpools identified for "Commercial Operations" appear to be designed to conform to the employee groups within AT&T that provide various customer services, rather than identifying the underlying costs related to the various tasks. AT&T attempts to justify the need for individual sub-pools for service order processing and account inquiry, as well as a pool that includes both of these costs, because some "organizations" perform both types of services. We require AT&T to explain why, in the combined sub-pool, costs related to the two separate functions can not be differentiated.

94. In addition, the three pools AT&T proposes -- "Commercial Operations," "Customer Accounting" and "Other" -- must be explained and distinguished. In revising its manual, we require AT&T to reformulate its cost pools and sub-cost pools consistent with the requirements of the *Joint Cost Order*, and to distinguish between the cost pools.

95. Second, we also have questions about the allocation methods AT&T suggests for its sub-pools in the "Commercial Operations" pool. For its service order processing sub-pool, AT&T proposes to allocate costs based on the number of service orders processed. It is not clear from the proposal whether AT&T intends to count each service order. AT&T must clarify its proposal. Moreover, it is not clear whether service orders always relate exclusively to regulated or nonregulated services. If regulated and nonregulated services can be ordered together, AT&T must explain how it will separate the costs.

96. Third, the account inquiry sub-pool proposal is similarly flawed. AT&T proposes that the allocation for this sub-pool would be the "relative proportion of regulated and nonregulated inquiries." Again, AT&T has not explained whether it will count all inquiries, or whether each inquiry is always exclusively regulated or nonregulated. We have the same concerns with regard to the proposed allocation method for the credit sub-pool--credit verifications. We require AT&T to revise its manual accordingly.

97. Fourth, we are concerned that the methodology proposed for the collection sub-pool will lead to misallocations of cost. AT&T proposes to allocate this account based on the relative proportion of revenues. The costs associated with collection, however, may not bear any relationship to the revenues collected. We direct AT&T to devise a more cost causative methodology for allocating costs associated with its collection activity.

98. Finally, we object to the allocation methods proposed for those sub-pools that reflect more than one function. While we have already directed AT&T to reformulate its cost pool structures to eliminate these pools if possible, should AT&T elect to justify why these additional sub-pools are required, it must amend the allocation methodologies proposed for them. For example, AT&T proposes that the sub-pool containing costs relating to both service order processing and account inquiry costs be allocated based on the "number of service orders and account inquiries processed, weighted by the average work time required for these functions." AT&T must explain how it will develop the weighting factor so that we can understand whether its allocation proposal is reasonable. The sub-pool that includes costs relating to all four functions would be allocated "based on an actual observation of the employee's work activities over a period of at least seven consecutive calendar days." AT&T states that the observation would occur "at least annually. This proposal is unacceptably vague. In order to determine whether AT&T's proposed allocation method is reasonable, we must possess sufficient information concerning its proposed study to determine that its results will be reliable. AT&T must provide us with additional information concerning its study if it elects to retain this allocation proposal in its revised manual. We require AT&T to amend its manual accordingly.

Accounts 6711 through 6728 - Executive and Administrative Overheads

99. AT&T proposes, with one exception, to allocate the costs in these accounts pursuant to the general allocator or marketing allocator. Most of the accounts comprise a single cost pool under AT&T's proposals. We have previously discussed the problems with AT&T's cost pool structure, as well as with its overuse of the general and marketing allocators,[54] and we will not repeat that discussion here. We require AT&T to amend its proposals for these accounts to comply with the Commission's requirements for the allocation of costs. In the event AT&T finds that it must use the general or marketing allocator to allocate some of the costs in these accounts, its use must be justified in detail.

Account 7160 - Other Operating Gains and Losses

100. AT&T proposes to allocate this account based on the general allocator. AT&T itself acknowledges that the amounts in this account "occur irregularly or are peripheral to the major or central operations of the corporation." We believe that a better method of allocating the account would be to analyze each of the entries in this account in an attempt to directly assign costs to regulated or nonregulated activities if possible. Accordingly, we direct AT&T to amend its manual to reflect direct assignment.

Account 7210 - Operating Investment Tax Credits - Net

101. AT&T states that it will create cost pools for this account that correspond to the plant in service accounts, but it does not name those cost pools. Consistent with our prior statements on cost pools, we require AT&T to specify its cost pools for this account and the allocation methodology for each pool.

Account 7220 - Operating Federal Income Taxes ; Account 7230 - Operating State and Local Income Taxes ; and Account 7250 - Provision for Deferred Operating Income Taxes - Net

102. AT&T proposes to allocate the costs of Account 7220 and 7230 identically, based on the amount of regulated and nonregulated net taxable income. For Account 7250, AT&T proposes to assign the costs to different cost pools based on tax timing differences. The cost pools would be allocated based on the asset or expense amounts giving rise to the tax timing difference. We require AT&T to amend its proposals for these accounts to allocate costs based on book income.[55] As we stated in the *U S West Cost Allocation Manual Order* :

> Under the provisions of Part 32, carriers are required to account for income taxes on a normalized basis for all material timing differences. The effect of that requirement is to record income tax expenses in the books based on book income rather than taxable income. Thus, the net income tax expense for the period as recorded in Accounts 7220, 7230, and 7250 should reflect the income tax expense related to book income. We believe the resulting income tax expense in these three accounts for regulated and nonregulated operations after allocation should reflect relative income tax expense based on regulated and nonregulated book income.[56]

Furthermore, under its proposal AT&T must explain how it will derive separable taxable income amounts for regulated and nonregulated activities. Accordingly, AT&T must amend its manual to allocate each of these accounts based on book income. Finally, in revising its manual, AT&T must specify all of the cost pools it is creating in Account 7250 and the allocation method for each pool.

Account 7370 - Special Charges

103. AT&T proposes to divide this account into two cost pools, one for "abandoned projects" and one for "other." In revising its manual, we require AT&T to create an additional cost pool for contributions.

IV. PROCEDURAL ISSUES

104. In this section we address a number of procedural issues affecting AT&T's cost allocation manual. These issues are: (a) the submission of a revised manual in compliance with this Order; (b) interim reporting and retention requirements; and (c) the routine submission of future amendments to the manual.

105. *Revised manual.* We have required AT&T to submit extensive amendments clarifying and changing many of its cost pool apportionment and cost allocation procedures. We have also directed AT&T to submit additional information concerning its affiliate transactions, list of nonregulated activities, incidental activities, and time reporting mechanisms. In many cases, the additional information requested is needed to form a judgment concerning the reasonableness of AT&T proposed methods. In the *Joint Cost Order*, the Commission specifically provided for public comment on the manuals so that a determination on their compliance with Commission requirements would be based on a full record and so that the cost allocation methodologies would be exposed to public scrutiny prior to their implementation.[57] Similarly, we believe that our review of AT&T's amendments will be aided by public comment on the revisions.

106. We will evaluate the proposed revisions, as well as the comments that we receive, before issuing an order approving or disapproving the amendments. If we disapprove a proposed revision, we shall take whatever further action is required, including mandating specific allocation methodologies or other procedures, consistent with our delegated authority to implement cost allocation manuals. All revisions that are approved or ordered shall be made retroactive to January 1, 1988. In addition, to facilitate our review of the updated manual and its availability to the public, AT&T must file two updated copies of its revised manual with the Commission in looseleaf form with numbered and dated pages, within 60 days of the release date of this Order.[58] When amendments are submitted, each revised page must clearly indicate the word "REVISED" and the date next to the page number. All amended language must be indicated by a vertical line in the right margin of the page.

107. *Interim reporting and record retention.* The *Joint Cost Order* directed us to develop interim reporting and record retention requirements, pending the final resolution of these issues in the *Automated Reporting Requirements Order*.[59] In that proceeding, the Commission delegated to us the authority to determine the parameters of the data to be filed concerning the separation of joint and common costs.[60] The Commission also specified that the first report containing the results of the implementation of the cost manuals would be filed on June 1, 1988, covering the period of January 1, 1988 to March 31, 1988. The Commission directed us to finalize our reporting standards prior to that date. Given that reporting will begin within months of the release of this Order, we decline to issue interim reporting formats. We believe our resources are better devoted to assuring that the permanent reporting requirements, scheduled to become effective on **June 1, 1988,** are properly designed and implemented. Any misallocations that may be detected can be corrected at that time.

108. We require that AT&T retain, on an interim basis, all of its accounting records together with any calculations necessary to perform cost allocations that will be necessary to report cost allocations to the Commission. For the interim, records must be maintained at a cost pool level.

109. *Routine amendments.* In addition to reporting and recordkeeping requirements, we also must resolve the larger issue of the procedures AT&T will be required to follow when updating its cost allocation manual. We conclude that AT&T will be subject to the same requirements that we imposed on the BOCs.[61] As we have determined in the BOC context, we recognize that the accuracy of different sections of the manual will have different effects on our ability to monitor the cost allocation process. Therefore, we will apply the following requirements for the update of AT&T's manual. First, because it is very important for the Commission to obtain current information on the cost categories and how these are allocated between regulated and nonregulated activities, several categories of information require our attention before the manual is implemented. These are: (1) changes to the cost categories and their allocation mechanisms, including changes reflecting the introduction of enhanced services that require shared use of basic network switch investment; and (2) a change in the way employee time, including nonproductive time, is allocated. Each of these changes in the cost manuals must be submitted at least 60 days prior to implementation. Parties seeking to comment on the proposed amendments will be provided an opportunity to do so prior to implementation and will be notified by public notice of the comment dates. The proposed amendments to the manual will be deemed accepted unless the Bureau, pursuant to its delegated authority, rejects or stays the effectiveness of the change.[62]

110. Second, because other information, such as corporate structure, may not be quite as critical for cost allocation monitoring purposes, we require that AT&T file such changes in a timely manner.[63] A modification to a carrier's cost manual to reflect a corporate reorganization does not require our advance approval and, therefore, does not need to be filed prior to the corporate restructuring. Finally, all other changes to the manual should be submitted quarterly, on March 31, June 30, September 30 and December 31 of each year.

111. We believe that these procedures will ensure that the ongoing process of implementing cost allocations will continue to be conducted according to the requirements in the *Joint Cost Order*. At the same time, they minimize the number of times AT&T must seek prior Commission approval before implementing a change and provides a system to ensure timely review of AT&T's proposals.

V. ORDERING CLAUSES

112. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that AT&T's Cost Allocation Manual, File Number AAD 7-1885, IS APPROVED, subject to the conditions set forth in this Order.

113. IT IS FURTHER ORDERED that revised copies of the Cost Allocation Manual shall be submitted within 60 days from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] "AT&T," as used in this Order, shall refer to the AT&T Communications, Inc., a subsidiary of American Telephone and Telegraph Co. AT&T Communications, Inc. operates AT&T's common carrier activities, including those activities of the Interstate Division (itself a division of the parent company) and the 24 long distance companies.

[2] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *further recon. pending.*

[3] 51 Fed. Reg. 43498 (Dec. 2, 1986), *to be codified at* 47 C.F.R. Part 32.

[4] *American Telephone and Telegraph Co.*, 3 FCC Rcd 143 (1988).

[5] The commentors are: Ad Hoc Telecommunications Users Committee (Ad Hoc), MCI Communications Corporation, Inc. (MCI), and Telenet CommunicationsCorporation (Telenet).

[6] *Joint Cost Order*, 2 FCC Rcd at 1328. The *Joint Cost Order* uses the term "cost categories" to describe groupings of costs that are homogeneous in nature for cost allocation purposes. The accounting profession's term for "cost categories" is "cost pools." We will use the two terms interchangeably in this Order.

[7] *Id.* at 1321-22.

[8] *See* Section IV, *infra*. If the additional material AT&T submits does not permit us to determine whether the cost apportionment or cost allocation methods meet Commission requirements, we will order AT&T to adopt a methodology of our own choosing, pursuant to our delegated authority to implement cost allocation manuals.

[9] MCI Comments at 1-4.

[10] AT&T Reply at 1, n.**.

[11] *AT & T Communications*, 2 FCC Rcd 7389 (1987).

[12] *See Joint Cost Order*, 2 FCC Rcd at 1335; *Reconsideration Order*, 2 FCC Rcd at 6295. Services must be valued at the prevailing price, if the service is generally available to the public. If it not generally available, the cost of the service will be allocated pursuant to the cost allocation standards of Section 64.901 of the Commission's Rules. For assets, transactions will also be recorded at the prevailing price, if one exists. If not, assets transferred from the affiliate to the carrier will be recorded at the lower of net book cost and fair market value, while assets transferred from the carrier to the affiliate will be recorded at the higher of net book cost or fair market value. *See Joint Cost Order*, 2 FCC Rcd at 1343, 1345, *amended by Reconsideration Order*, 2 FCC Rcd at 6308-09.

[13] *Joint Cost Order*, 2 FCC Rcd at 1328.

[14] Telenet Comments at 1-7.

[15] AT&T Reply at 1-2, n.**.

[16] *AT & T Communications, Inc.*, Mimeo No. 3264, released March 25, 1986, *aff'd*, 2 FCC Rcd 588 (1987).

[17] *Id.*

[18] In at least one case, AT&T's proposals do not appear to adhere to Commission requirements. The transaction involving AT&T Technologies' transfer of communicationsand information systems exclusively to AT&T should not be made at "cost," as the manual states, but at the lower of fair market value or net book cost.

[19] AT&T Cost Allocation Manual Attachment B at 1 and Attachment C.

[20] AT&T Cost Allocation Manual Attachment B at 1, n.

[21] *Id.* at 1, n.**.

[22] *Joint Cost Order*, 2 FCC Rcd at 1321-22.

[23] *Id.* at 1328.

[24] *See id.* at 1344.

[25] Ad Hoc Comments at 3-8.

[26] AT&T Reply at 2-4.

[27] AT&T characterizes its transaction services offering as a computer-based enhanced service that allows merchants at points of sale to interact with computers used by merchant credit processors to process sales, credit, debit, or check transactions, or other transactions requiring authorization. *See* AT&T Comparably Efficient Interconnection Plan for Transaction Services, filed October 26, 1987.

[28] Ad Hoc Comments at 13-18.

[29] AT&T Reply at 8-9.

[30] *Joint Cost Order*, 2 FCC Rcd at 1318.

[31] *Id.* at 1319.

[32] *Id.* at 1323-24.

[33] AT&T Cost Allocation Manual at 5-6.

[34] This series of accounts contains executive and administrative overhead costs.

[35] *Joint Cost Order*, 2 FCC Rcd at 1319.

[36] *Id.*

[37] *See , e. g.*, AT&T Reply at 6, n.** (explaining that the manual uses assignment to mean assignment, attribution or allocation).

[38] *Joint Cost Order*, 2 FCC Rcd at 1300, n.9.

[39] *Id.* at 1318.

[40] *Id.* at 1328.

[41] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, *Report and Order*, 2 FCC Rcd 5770 (1987) at Appendix C.

[42] Amendment to Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, 3 FCC Rcd 269 (1987) (*Rate Base Order*), petitions for reconsideration pending.

[43] Joint Cost Order, 2 FCC Rcd at 1328.

[44] Id. at 1319.

[45] Similarly, AT&T must justify its allocation proposals for its office support equipment cost pool in Account 2123 - Office Equipment.

[46] Ad Hoc Comments at 9-11.

[47] Id. at 11-12.

[48] AT&T Reply at 4-7.

[49] See, e.g., AT&T Application for Authority to Install and Operate Packet Switches at Specified Telephone Company Locations, Memorandum Opinion, Order, and Authorization, 94 FCC 2d 48, 57 (1983). Pending the resolution of the Computer III proceeding, the Chief of the Common Carrier Bureau granted AT&T a waiver of the Computer II structural separation requirements only for enhanced services that use computer processing facilities that are not colocated with AT&T basic service network facilities. Petition of AT&T for Limited and Temporary Waiver of 47 CFR Section 64.702 Regarding its Provision of Unregulated Services Externally to the AT&T-C Network, Mimeo No. 1147 (released November 27, 1985). See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958, 982, para. 38 (1986), modified on recon., 2 FCC Rcd 3035 (1987)(Phase I Reconsideration Order), modified on further recon., 3 FCC Rcd (1988). Under the revised Computer III requirements, AT&T must implement a Commission-approved, service-specific Comparably Efficient Interconnection (CEI) plan as a precondition to offering each integrated or colocated enhanced service that it proposes. Phase I Reconsideration Order, 2 FCC Rcd at 3042, para. 45. The Commission has not yet approved any AT&T CEI plans.

[50] Phase I Reconsideration Order, 2 FCC Rcd at 3042, para. 45.

[51] Ad Hoc Comments at 12-13.

[52] AT&T Reply at 7.

[53] By pointing out that there may be some joint and common costs associated with product management, we are not implying that AT&T should employ the marketing allocator to allocate costs in this account. We merely intend to identify a flaw in the cost pool structure created by AT&T.

[54] See Section III, B., supra.

[55] We consider book income to be operating book income before taxes and minus interest expense. Operating book income, in turn, consists of the difference between operating revenues and operating expenses recorded in USOA accounts.

[56] U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 209 (1988).

[57] We require AT&T to serve copies of its revised annual on all parties to the AT&T manual proceeding.

[58] One copy will be made available in the Accounting and Audits Division reference room, while the other will be maintained for staff use.

[59] Joint Cost Order, 2 FCC Rcd at 1328-29.

[60] Automated Reporting Requirements Order, 2 FCC Rcd at 5775.

[61] See, e.g., Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 433 (1988).

[62] A stay of the effectiveness of a proposed change will not extend beyond 180 days.

[63] Of course, changes to corporate structure that also affect cost categories need to be filed in advance of implementation, as discussed supra.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HAWAIIAN TELEPHONE COMPANY — File No. I-T-C-88-055

Application for authority to transfer circuits from the Paumalu earth station to the Sunset earth station for international services to points in the Pacific area

ORDER AND AUTHORIZATION

Adopted: March 18, 1988; Released: March 29, 1988

By the Acting Chief, International Facilities Division:

1. The instant uncontested application, filed on December 21, 1987 by Hawaiian Telephone Company (HTC), requests authority to transfer all of its international circuitry from the Paumalu, Hawaii earth station, which will be closed in the near future,[1] to the Sunset, Hawaii earth station (Sunset), which will be modified to handle international traffic.[2] HTC will be acquiring the space segment from Comsat, as it does at present, and will acquire earth station facilities from the owner of the newly equipped Sunset earth station, GTE Spacenet.

2. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

3. Accordingly, IT IS ORDERED that application File No. I-T-C-88-055. IS GRANTED, and HTC is authorized to:

a. transfer all of its satellite circuitry from the Paumalu earth station to the Sunset earth station;

b. lease from GTE Spacenet and operate facilities in the Sunset earth station; and

c. use said facilities to provide HTC's regularly authorized services between Hawaii and points in the Pacific area which HTC has beeen authorized to serve and beyond.

4. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order *(see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* application filed on December 18, 1987 by Comsat Earth Stations, Inc. (CES), File No. I-T-C-88-059. We are granting the CES application in a companion order. *See* Comsat Earth Stations, Inc., DA 88-407.

[2] *See* applications filed November 20, 1987 by GTE Spacenet, File Nos. CSG-88-008-P/L and I-T-C-88-038. We are granting the GTE Spacenet applications in a second companion order, GTE Spacenet Corporation, DA 88-406.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORPORATION — File No. CSG-88-008-P/L, File No. I-T-C-88-038

Application for authority to construct and operate a multipurpose international earth station at Sunset, Hawaii

Application for authority to operate an international earth station at Sunset, Hawaii, for provision of uplink and downlink services for established channels of international traffic

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: March 18, 1988; Released: March 29, 1988

By the Acting Chief, International Facilities Division:

1. The Commission is considering two applications, filed on November 20, 1987, by GTE Spacenet Corporation (GTE), requesting authority, pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), 201(c)(6), 201(c)(7) and 201(c)(9) of the Communications Satellite Act of 1962, as amended, to construct and operate an international multipurpose INTELSAT Standard A earth station at Sunset, Hawaii, and authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to furnish uplink and downlink services at this earth station for provision of international services by authorized users of the earth station who will acquire their own space segment. The applications were placed on public notice on December 2, 1987. No comments were received.

2. The proposed multipurpose earth station will conform with INTELSAT Standard A technical parameters and will utilize an already existing 32 meter antenna at the Sunset, Hawaii, site. The antenna will be modified to operate with INTELSAT Pacific Ocean Region (POR) satellites in the 6/4 GHz bands.

3. The international earth station complex at Paumalu, Hawaii will be closed sometime in 1988. This modified Sunset, Hawaii earth station is expected to carry the traffic rerouted from the Paumalu complex. An application has been filed by Comsat for authority to discontinue operations at the Paumalu earth station.[1] Upon that discontinuance, no international earth station services will be available in Hawaii, other than via the Sunset earth station.[2] All of the Paumalu circuits will be transferred to Sunset at that time. [3]

4. The proposed station will be equipped to provide Frequency Division Multiplex/Frequency Modulation (FDM/FM) services, Single Channel Per Carrier (SCPC) services, International Television with associated audio, and occasional use of INTELSAT Business Services (IBS). GTE estimates the proposed multipurpose earth station will require a capital expenditure of approximately $1,702,300.

5. In its Report and Order in the Earth Station Ownership Proceeding, CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[4] In that decision, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concern about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the U.S. as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that, absent special problems, it would treat these applications as routine and expeditiously process them. The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[5]

6. With respect to applications for construction of multipurpose earth stations, the Commission stated that it would continue to closely scrutinize such applications as they raise more complex economic, technical and operational issues and may affect the variety, quality and price of services offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would analyze the impact of a grant on the provision of earth station and space segment services. It would conduct this analysis of how a proposed facility would affect service to the public by balancing the possible benefits *(e.g.,* shorter terrestrial hauls, increased user options, lower charges to users and increased customer base for INTELSAT services) against possible detriments (reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[6] In the companion order allowing discontinuance of operations at the Paumalu, Hawaii earth station complex, we have relied on the availability of the Sunset facility to avoid disruption of service to the public with the dissolution of the Hawaii Consortium of ESOC.[7] Further, since all circuits will continue to be routed via INTELSAT POR satellites, no harm to INTELSAT will result from the proposed transfer.

7. GTE has the legal, technical, and financial qualifications to construct the proposed multipurpose earth station. GTE is communications carrier pursuant to Section 214 of the Communications Act and provides a variety of international communications services. The proposed earth station conforms with INTELSAT technical parameters for Standard A earth stations. GTE has completed the necessary frequency coordination.

8. Upon consideration of the application, we find that authorization of the requested services and facilities is in the public interest.

9. Accordingly, IT IS ORDERED, pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that applications File Nos. CSG-88-008-P/L and I-T-C-88-038 ARE GRANTED, and GTE is authorized to:

a. construct and operate the proposed INTELSAT Standard A multipurpose earth station at Sunset, Hawaii, to replace the earth station at Paumalu, Hawaii,[8] to provide FDM/FM, SCPC, International television with associated audio, and occasional use of IBS and related digital video services;[9] and

b. provide uplink and downlink services between Hawaii and points served by the Paumalu earth station to authorized users of the earth stations who will acquire their own space segment.

10. Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

11. The Commission retains jurisdiction over this matter to insure that all present and future authorized carriers have nondiscriminatory use of, and equitable access to, the communications satellite system and earth stations.

12. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Comsat Application, File No. I-T-C-88-059, filed December 17, 1987. In a companion order, we grant the request to discontinue operations. *See* Comsat Earth Stations, Inc., DA 88-407.

[2] Thus, we find that, under the Commission's international competitive carrier policies, GTE Spacenet is dominant in its provision of multipurpose earth station services on Hawaii. In its International Competitive Carrier decision, the Commission classified as dominant U.S. carriers providing international service for non-contiguous domestic points, because these carriers currently do not face competition in their markets. It required any application to initiate multipurpose earth station services to include adequate information for the Commission to make a finding as to the issue of non-dominance. International Competitive Carrier Policies, 102 F.C.C. 2d 812, 832, 839, 844-45 (1985) *recon. denied* FCC 86-339 (released August 7, 1986).

[3] This transfer may require some overlap in the initiation of service at Sunset and termination of service at Paumalu to ensure that customers which cannot tolerate any service downtime are accommodated. *See* March 15, 1988 letter from Leslie A. Taylor, Director of Government Affairs, GTE Spacenet, to Chief, International Facilities Division.

[4] 100 F.C.C. 2d 250 (1984).

[5] *See* the cases cited in Satellite Gateway Communications, Inc., (File Nos. I-T-C-86-045 et al.), Mimeo No. 2896 (released March 4, 1986) and American Telephone and Telegraph Co. (File Nos. CSG-86-013-P/L et al.), Mimeo No. 3327 (released March 25, 1986).

[6] 100 F.C.C. 2d at 284.

[7] ESOC is the Earth Station Ownership Committee, consisting of Comsat and various U.S. international carriers which are in the process of dissolving their joint ownership interests in ESOC multipurpose earth stations on the United States mainland, Hawaii and Guam. *See e.g.*, American Telephone and Telegraph Company, 2 FCC Rcd 6635 (1987).

[8] Because the Sunset facility will replace the Paumalu earth station, GTE Spacenet must ensure that the existing satellite circuits in the Paumalu facility are transferred to the Sunset facility without disruption of service to customers.

[9] This authorization is not to be construed as permitting the provision of FDM/FM, SCPC, International TV, or IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT EARTH STATIONS, INC. File No. I-T-C-88-059

Application to Discontinue the Operation of the Paumalu, Hawaii International Earth Station (KA-21/24/29) Operating in the Pacific Ocean Region with the INTELSAT Global Satellite System

ORDER AND CERTIFICATE

Adopted: March 18, 1988; Released: March 29, 1988

By the Acting Chief, International Facilities Division:

I. INTRODUCTION

1. On December 18, 1987, COMSAT Earth Stations, Inc. (CES), filed an application requesting authority, pursuant to Section 214 of the Communications Act of 1934, 47 U.S.C. Section 214, and Section 63.501 of the Commission's rules, 47 C.F.R. Section 63.501, to discontinue the operation of, and the provision of channels of communication through, the international earth station (KA-21/24/29) at Paumalu, Hawaii.[1] The application is unopposed.

II. BACKGROUND AND APPLICATION

2. CES, a subsidiary of the Communications Satellite Corporation (COMSAT), is a communications common carrier which operates the Paumalu earth station owned by the Hawaii Consortium of the Earth Station Ownership Committee (ESOC).[2] CES advises that, on July 24, 1987, the joint owners of the Paumalu earth station voted to retire this station, effective at the time that the replacement multi-purpose earth station at Sunset, Hawaii becomes available, anticipated to be on or about March 31, 1988. CES further advises that the joint owners will surrender their radio station license KA-21/24/29 at the appropriate time.

3. On November 20, 1987, GTE Spacenet filed an application with the Commission to construct and operate a new earth station at Sunset, Hawaii. [3] GTE Spacenet advises that this facility will be used to provide ground segment origination and termination services for international communications channels originating from, terminating in or transiting Hawaii as established by the various users of the earth station facility. GTE Spacenet states that, with the dissolution of ESOC, the Sunset earth station will provide a cost-effective replacement for the communications services provided through the Paumalu facility.

II. DISCUSSION

4. The instant applications are among a series of filings presented to the Commission in response to its *Earth Station Modification Order*.[4] This decision adopted a policy permitting carriers other than Comsat and the ESOC composed of Comsat and U.S. international service carriers to own and operate international multi-purpose earth stations. The Commission concluded that a more liberalized earth station ownership policy would benefit users by increasing carrier and service benefits and creating competitive pressures on rates. One of the central issues raised by the transition to a new competitive earth station ownership policy was the appropriate disposition of the ESOC earth station investments. The Commission permitted the ESOC owners to negotiate among themselves the future of ESOC and then submit an agreement for Commission consideration. The Commission stated its expectation that any arrangements proposed by the ESOC owners would assure the continuance of efficient, high quality service without disruption at reasonable rates and with equitable access. With respect to any contentions of revenue diversion from ESOC stations to new, competing facilities, it determined to look primarily at the effect on service to the public rather than the effect on a petitioning carrier.

5. The ESOC owners recently have submitted to the Commission a series of applications seeking to implement the dissolution of ESOC. A number of these filings have been granted to date.[5] In its instant application, CES advises that, once the joint owners of the U.S. Mainland Consortium of ESOC decided to transfer their interests in the Etam, Roaring Creek and Jamesburg earth stations to AT&T,[6] the desirability of maintaining the joint ownership arrangements for other multi-purpose stations was eliminated. The joint ownership arrangements, CES states, were based, among other factors, on the desirability of cost averaging among high and low volume stations and of applying a uniform global rate for multi-purpose earth station services. CES states that the joint owners of Paumalu voted to retire the Paumalu facility after Hawaiian Telephone Company (HTC), the major carrier user of Paumalu, informed the Hawaii Consortium that it would be transferring its traffic to Sunset upon Sunset's availability and after the remaining major users of the Paumalu facility informed the consortium that they also would be transferring their traffic requirements to Sunset "for financial efficiency reasons associated with economies of scale." In its separate application, GTE Spacenet states that the Sunset earth station facility will provide a cost effective replacement for the services provided by the Paumalu facility, and that GTE Spacenet will provide all customers currently served by the Paumalu, Hawaii facility with equitable and nondiscriminatory access to the Sunset earth station.[7]

6. Thus, the decision of the Paumalu owners to dissolve the Hawaii Consortium of ESOC and retire the Paumalu earth station is consistent with the Commission's decision in the *Earth Station Modification Order*. The proposed arrangements assure continuation of efficient, high quality service to customers. Service to customers will not be disrupted because the Paumalu facility will continue operations until the circuits are transferred to the Sunset facility.[8] Moreover, with the planned dissolution of the Hawaii Consortium of ESOC, no party has contended that revenues would be diverted from Paumalu to Sunset so as to significantly impact any carrier's ability to provide service to the public and to adversely affect the public.

Considering the above described developments which have taken place since Commission modification of its earth station ownership policy and the absence of opposition to the immediate application, the Commission finds that the grant to discontinue operations at the Paumalu earth station will serve the public interest, convenience and necessity.

III. ORDERING CLAUSES

7. Upon consideration of the application, IT IS CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of use and operation of the Paumalu, Hawaii, multi-purpose earth station.

8. Accordingly, IT IS ORDERED that the component of the CES application, File No. I-T-C-88-059, seeking to discontinue operations at Paumalu, IS GRANTED and CES is authorized to discontinue the operation of the Paumalu, Hawaii earth station effective on the date that the existing satellite circuits in the Paumalu facility are transferred to the Sunset international earth station authorized in File Nos. CSG-88-008-P/L and I-T-C-88-038.[9]

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] CES' December 18, 1987 filing, Application and Report, File No. I-T-C-88-059, requests such additional authority as may be necessary to conclude its provision of multi-purpose earth station services at several international earth stations. We are segregating out, for purposes of this order, that portion of the filing that relates to the Paumalu earth station.

[2] The Hawaii Consortium of ESOC is composed of RCA Global Communications, Inc., Western Union International, Inc., ITT World Communications, Inc., Hawaiian Telephone Company and CES.

[3] *See* GTE Spacenet Application, File No. CSG-88-008-P/L, filed November 20, 1987. We are granting GTE Spacenet's application in a companion order. *See* GTE Spacenet Corporation, DA 88-406.

[4] 100 F.C.C. 2d 250 (1984).

[5] *See* American Telephone and Telegraph Co., 2 FCC Rcd 6635 (1987)(approving AT&T's acquisition of Etam, Roaring Creek and Jamesburg facilities); MCI Communications Corp., 3 FCC Rcd (1987)(granting MCI's acquisition of Andover earth station); Comsat International Communications, Inc., 2 FCC Rcd 1167 (1987)(allowing discontinuance of Brewster Flat facility).

[6] *See* 2 FCC Rcd 6635 (1987).

[7] GTE Spacenet Application, FCC File No. CSG-88-008-P/L, filed November 20, 1987.

[8] In a companion order we are granting the HTC application, File No. I-T-C-88-055, to transfer its satellite circuits from the Paumalu facility to the Sunset earth station. *See* Hawaiian Telephone Corporation, DA 88-405.

[9] *See* GTE Spacenet Corporation, DA 88-406. This transfer may require some overlap in the initiation of service at Sunset and termination of service at Paumalu to ensure that customers which cannot tolerate any service downtime are accommodated. *See* March 15, 1988 letter from Leslie A. Taylor, Director of Government Affairs, GTE Spacenet to Chief, International Facilities Division.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 1 — Transmittal No. 1105

ORDER

Adopted: March 18, 1988 **Released: March 21, 1988**

By the Chief, Common Carrier Bureau:

1. On January 14, 1988, the American Telephone and Telegraph Company (AT&T) filed the captioned tariff revisions which went became effective on March 14, 1988. AT&T's filing deleted promotional compensation for Dial-It 900 Service information arrangements from its tariff. The 900 Service permits "sponsors" taking service under the tariff to furnish, for a fee, live or recorded messages and information programs. The tariff revision also reduced the initial minute rate of a 900 Service call from $.50 to $.45. AT&T Transmittal at 2. Infotel, Inc. (Infotel), which provides a sports information service using AT&T's 900 Service, submitted a letter opposing the proposed revision, which we construe as a petition to reject or suspend. AT&T filed a reply, and Infotel filed a response.[1]

2. AT&T states that it offered promotional compensation to encourage sponsors to develop, advertise, and promote high call volume programs. AT&T Transmittal at 1. AT&T asserts that this purpose has been achieved, and that it no longer needs to offer the compensation. Customers who currently receive promotional compensation under AT&T's tariff will be required to negotiate a contract with AT&T under its premium billing arrangement, an unregulated offering.

3. Infotel contends that the tariff revisions would cause it considerable financial harm. Infotel Opposition at 1. Infotel explains that 52.5 percent of its gross income in 1987 from its 900 Service offering was directly attributable to second and succeeding minutes, and that those minutes will no longer be compensated under the tariff. *Id.* at 5. Infotel claims that under the premium billing arrangement a program vendor will receive only the premium billing share of 5 cents (the difference between the 50 cents it collects and the 45 cents it pays AT&T) for the first minute of the call, and will receive no compensation for the succeeding minutes, even though AT&T will collect 35 cents for each of these additional minutes.

4. AT&T replies that sponsors do not have a right or a reasonable expectation under the tariff to receive compensation, and that AT&T is not obligated to compensate them. AT&T Reply at 3-4. AT&T maintains that the structure and level of rates for its Dial-It 900 Service are not germane to the instant tariff proceeding. *Id.* at 5.

5. We note that there are a number of complaints on record with the Commission which challenge AT&T's premium billing arrangement. *See* , *e. g.*, Enforcement Division File No. IC 88-00480. A decision to refrain from initiating a Section 204 investigation of Transmittal No. 1105, does not, of course, affect those proceedings. *See* note 1, *supra*.

6. The Common Carrier Bureau has reviewed Transmittal No. 1105, Infotel's opposition and AT&T's reply. We find that Infotel has not presented any compelling argument that the tariff is patently unlawful so as to require rejection, and that an investigation of the revisions is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition filed by Infotel, Inc. against AT&T's Tariff F.C.C. No. 1, Transmittal No. 1105, is DENIED.

8. IT IS FURTHER ORDERED that the response filed by Infotel, Inc. against AT&T's Tariff F.C.C. No. 1, Transmittal No. 1105, IS DISMISSED.

9. IT IS FURTHER ORDERED that the petition to accept late-filed pleadings filed by S.H.L. Enterprises IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] The Infotel response, which is not an authorized pleading under the Commission's Rules, has not been considered in our review of the pleadings. On March 10, 1988 S.H.L. Enterprises (S.H.L.) filed a petition to reject, a petition for stay or suspension and a petition to accept its late-filed pleadings. These pleadings were filed 56 days after AT&T's tariff was filed and only four days prior to its effective date. We deny S.H.L.'s motion to accept its late-filed pleadings because S.H.L. has not shown any good cause for the grant of its request. S.H.L. also filed a supplemental motion on March 11, requesting that its pleadings be construed as an informal complaint under 47 C.F.R. § 1.41. That request is under consideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-498

In the Matter of

Amendment of Rules Governing
Procedures To Be Followed Where
Formal Complaints Are Filed Against
Common Carriers.

REPORT AND ORDER
(PROCEEDING TERMINATED)

Adopted: March 1, 1988; Released: March 30, 1988

By the Commission:

I. BACKGROUND

1. On January 9, 1987, the Commission released a Notice of Proposed Rule Making[1] (NPRM) proposing changes to our rules to be followed in common carrier formal complaint cases. The rules regarding formal complaints are presently set forth in 47 C.F.R. §§ 1.721-1.735. The amendments were proposed in order to promote the creation of a better and more complete record for the disposition of formal complaints, to improve the speed of resolving such complaints, and to clarify and simplify the present rules.

2. The major changes proposed included provision for limited forms of discovery, including self-executing discovery in the form of interrogatories, filing of briefs, submission of legal and factual support by the parties, status conferences, and a section detailing general pleading requirements. In addition, we proposed to refine and reorganize in a clearer fashion certain sections of the present rules and to make other necessary conforming revisions.

3. In this *Report and Order* we adopt new formal complaint rules which meet the above objectives. After careful consideration of the pleadings filed in response to the NPRM, we conclude that this revision of the rules, substantially as proposed, benefits the public interest and results in a set of procedures which will produce well-pleaded complaint cases and facilitate our prompt and fair disposition of such matters. The full text of the rules is set forth in Appendix B.

II. DISCUSSION

4. Comments and replies were filed by numerous parties, which are listed in Appendix A. We have reviewed and considered all comments and replies submitted by the parties. These pleadings were generally in favor of the revisions to our formal complaint rules. Almost without exception,[2] the commenting parties voiced support for the NPRM objectives and for most of the proposals designed to achieve those goals. [3] However, they suggested a number of changes in the proposed rules, which we will discuss in the following paragraphs. Our discussion will address the proposed rule sections sequentially and then turn to miscellaneous matters not related to any specific NPRM proposal. Only one issue, regarding the need for and extent of discovery, generated any controversy. Although we dispose of minor matters with only brief discussion, we have carefully considered all arguments regarding such matters in adopting these final rules.

A. *General pleading requirements (Section 1. 720).*

5. We proposed to include in our rules, for the first time, a section detailing general pleading requirements. This rule entails such things as the requirement that parties (1) cite legal authority supporting their positions, (2) provide relevant documentation in support of the pleadings, (3) distinguish opposing legal authority, (4) set forth in a clear and concise manner facts sufficient to constitute a specific violation or a defense to an alleged violation, and (5) maintain an accurate and updated record.

6. GTE in its comments urged the Commission to use "notice" pleading, i.e. a bare-bones pleading, rather than require detailed pleading of facts. NYNEX suggested that we add a subsection (i) providing that parties must state "whether the Commission or any other regulatory body has previously considered the legal or factual assertions which form the basis of the cause of action." Pacific requests that the word "Formal" be added to the beginning of the text. Pacific also proposes that the word "non-Commission" be deleted from Section 1.720(f), so that parties are required to attach copies of all authorities not routinely available, including Commission orders. USTA suggests that Section 1.720(h) be revised to require reference not only to the tariffs on which they have relied, but also to any bill, invoice or other supporting document relied on, and to require parties to provide copies of such documents.

7. We will include the word "Formal" at the beginning of the text since these rules deal only with formal complaint proceedings, as distinguished from informal complaint cases. However, we believe it would be unduly burdensome to require parties to attach copies of Commission authorities on which they have relied. USTA's request to require reference to bills and other supporting documents duplicates the requirement of Section 1.720(c) that relevant documents be provided. If it appears in any individual case that bills, invoices or other documents are necessary and have not been provided under Sections 1.720(c) or 1.720(h), parties will be able to address the matter under our new procedures such as Section 1.730, which allows parties to request production of documents, or during a status conference. We believe it is more appropriate to handle such requests as they may arise, rather than saddling parties with the production of potentially voluminous material before the need for the documentation is shown. An alternative method of providing such information, such as making documents available for inspection and copying, may be adequate in many circumstances.

8. We find merit in NYNEX's suggestion that the complainant should advise whether suit on the same cause of action has been filed with other government agencies since complainant should possess such information and it is relevant to the issue of how we should proceed to resolve a case. However, we find that the requirement that parties state whether the Commission or other body has previously considered the legal or factual matters at issue to

be in other respects too broad and vague because the purpose of the instant requirement is only to learn whether the specific complaint at issue is being addressed elsewhere. Such specificity can, of course, be provided as desired by the parties and should be provided if there is direct precedent regarding similar legal and factual issues. *See* Section 1.720(d). We will not adopt GTE's suggestion that we rely on notice, rather than fact, pleading. Formal complaint proceedings, unlike court litigation or administrative trial-type hearings, are often resolved solely on the written pleadings. These pleadings must therefore stand on their own and provide the factual underpinnings for a decision on the merits. By requiring fact pleading at the outset, many complaints can be swiftly resolved, reserving discovery procedures for the more complex cases. Reliance on notice pleading, followed by submission of facts, is inappropriate for many formal complaint proceedings and might inject unnecessary delay into the proceedings.

B. ***Format and content (Section 1. 721).***

9. We proposed to revise the suggested complaint format to include a clearer and fuller exposition of the contents of a complaint. It was anticipated that a clearer and more complete complaint will lead to more responsive pleadings and, thus, a better record overall for ultimate disposition.

10. Mountain States suggested that the complainant should state the amount of damages claimed where complainant possesses such information. USTA proposes that we add to Section 1.721(a)(4) a requirement that the complainant state the basis for Commission jurisdiction over the carrier. USTA also proposes that we revise Section 1.721(a)(8) to read: "Whether issues or facts related to the complaint are at issue in any state commission or other administrative agency, or a court, and a description of the other proceeding."

11. We agree with Mountain States' suggestion that complainant should disclose the amount of claimed damages, if known. Fuller disclosure of the relief requested at the outset will assist both the parties and the staff in focusing the issues for resolution and may also result in the parties reaching amicable settlements. However, we believe USTA's suggestion to require a statement of jurisdiction will provide no incremental benefit to the process. Any complaint which complies with our rules will already include sufficient information for the Commission to determine where jurisdiction lies. Where the complaint is well-pleaded, which these rule changes attempt to accomplish, the Commission's jurisdiction will be apparent. If it is not, jurisdiction is clearly a matter which will be called into question in a responsive pleading or a motion to dismiss. Moreover, we will not adopt USTA's suggested revision of Section 1.721(a)(8) to require parties to disclose whether any facts or issues are being considered elsewhere. We have already revised Section 1.721(a)(8) to require complainants to state whether suit has been filed in a court or other government agency on the same cause of action, and the request is in other respects too broad *See* para. 8, *supra.*

C. ***Damages (Section 1. 722).***

12. The complaint rules have long required that supplemental complaints requesting damages for the first time be filed within the statute of limitations period contained in 47 U.S.C. § 415.[4] We proposed to add the requirement that supplemental complaints specifying damages be filed within 60 days of a decision on the merits of a complaint. We anticipated that this additional requirement would discourage the filing of stale claims and result in a more ascertainable cut-off period for damages.

13. GTE and Ad Hoc object to this proposed section. GTE suggests that the 60-day limitation be eliminated, arguing that it is an improper attempt to shorten a limitations period set by statute because it creates a possibility that a claim may be barred even though the limitations period has not run. Ad Hoc suggests that the requirement that damages be requested within the limitations period be eliminated, arguing that supplemental complaints for damages should be permitted to relate back to the filing date of the original complaint. ACTA requests that we adopt a liberal extension of time policy regarding the 60-day deadline in appropriate circumstances, such as where damages are difficult to calculate. Pacific suggests that we require complainants to identify damages with reasonable certainty, and USTA proposes that the section be amended to require that supplemental complaints contain a proof-of-service statement.

14. We have revised proposed Section 1.722 to make it clear that the 60-day filing period will not shorten the statutory limitations period. The 60-day period applies only to supplemental complaints specifying damages requested in the original complaint. The rule is intended to clarify that after damages are requested in the original complaint, supplemental complaints need not be filed periodically while the complaint is pending to preserve rights to damages for the period of time after the filing of the complaint. It will also ensure that damages are specified in a timely fashion after a decision on the merits. It will be used to determine if a claim for damages contained in a supplemental complaint relates back to the filing date of the original complaint. Since 47 U.S.C. § 415 requires that damages be requested within the statutory period, a complainant cannot file a supplemental complaint for damages after the limitations period has run unless damages were requested in the initial complaint on the merits. In light of this, we cannot agree with Ad Hoc's suggestion that all supplemental complaints be permitted to relate back to the filing date of the original complaint.[5] Of course, a supplemental complaint requesting damages for the first time would toll the statute of limitations for a period of two years prior to the date the supplemental complaint is filed independent of the 60-day rule outlined in Section 1.722(b)(2)(ii) of the rules.

15. We do not believe the 60-day deadline should be lengthened. A complainant exercising reasonable diligence will be aware in most cases before, and should know in all instances within, 60 days of a decision on the merits of the existence and nature of any damages it has incurred. We believe the rule assures proper and timely notice to defendants and affords complainants sufficient time to present a claim for damages. We can deal with unusual situations on a case-by-case basis. The revised rule incorporates Pacific's proposal that the rule specifically require identification of damages with reasonable certainty. However, a provision requiring proof of service, as suggested by USTA, is unnecessary since proof of service of all filings is required by Section 1.734(e). We therefore adopt the proposed rule with the modifications discussed above.

D. ***Joinder of complainants and causes of action (Section 1. 723).***

16. There were no comments on this rule, which is virtually identical to the present section on joinder. It will therefore be adopted as proposed in the NPRM.

E. *Answers* (*Section 1. 724*).

17. The section on answers was derived from the existing rules, but we proposed to adopt the approach of the Federal Rules of Civil Procedure whereby parties are required to either admit or deny an allegation in the complaint or indicate that they are without sufficient knowledge to admit or deny the allegation. This proposal would obtain a better framing of facts and issues in controversy as contemplated by Rule 12 of the Federal Rules of Civil Procedure.

18. MCI has suggested that the time to file an answer be tolled pending disposition of a motion to dismiss. Pacific urges us to allow 45 days to answer, rather than 30 days as provided in the rule. Pacific also proposes to modify Section 1.724(a) to add at the end, "unless the parties notify the Commission in writing of a mutually agreed upon extension of time to file an answer." USTA suggests that we amend proposed Section 1.724(b) to delete the words "a judgment" and insert "an order after reasonable notice to the defendant."

19. We agree with USTA's suggestion that we substitute the word "order" for "judgment," since the Commission traditionally has used orders to resolve complaints. However, additional notice to the defendant prior to entry of a default order for failure to timely answer a complaint is superfluous and would add an additional unneeded step to the resolution of the matters in controversy. The defendant is put on notice, by service of the complaint, that an answer is required and does not need additional notice that failure to answer may result in a default order. Of course, if the complaint were not properly served, a defendant could seek to overturn the default order on that basis.

20. The remaining suggestions, seeking a longer time to answer and allowing parties to agree to extensions of time, will not be adopted. In our experience, 30 days is ordinarily sufficient time to respond to a complaint. If time to answer is insufficient in a particular case, additional time to answer can be obtained by filing a motion for extension of time under Section 1.727. Although the fact that the parties agree to an extension weighs heavily in our decision whether to grant the motion, we do not believe it wise to always grant agreed-to extensions of time where they are unreasonably long. Parties which file complaints must be prepared to move their cases forward. Further, we see no benefit to adopting a rule which would automatically toll the time to answer while motions to dismiss are resolved. Such a rule would promote the filing of motions to dismiss to delay the necessity for filing responsive pleadings. Our experience shows that early filing of the initial pleadings in a complaint proceeding facilitates prompt resolution of the dispute. Therefore, these suggestions will not be adopted.

F. *Cross complaints* (*Section 1. 725*).

21. There were no comments on this rule, which is virtually identical to the present section on cross complaints. It will therefore be adopted without change.

G. *Replies* (*Section 1. 726*).

22. The section on replies was taken from the present rules and permits the complainant to serve a reply which is responsive to the answer but which does not contain new matters. NATA questions the purpose to be served by replies and whether they are necessary, except in extraordinary circumstances. We will not alter this rule because replies are strictly voluntary and are not mandatory pleadings. Moreover, since the complainant bears the burden of proof, the reply may provide it with a last opportunity to satisfy its burden and to respond to matters raised in defendant's answer.

H. *Motions* (*Section 1. 727*).

23. We proposed to include all motions within one broad section, which would require that the grounds and authority for the motion be stated, together with the relief sought. For motions dealing with procedure and discovery, we proposed to require that a proposed order for adoption be filed with the motion papers, to reduce the burden on the staff in drafting interim orders on matters of procedure and discovery. The submission of draft orders is routinely required in federal court practice.

24. MCI requests that the Commission clarify that deletion of prior Section 1.731, which was a section dealing only with two types of motions, motions to dismiss complaints or to make them more definite and certain, was not intended to remove or affect the right of a defendant to challenge by motion the adequacy of a complaint. MCI also urges that motions to dismiss should be permitted to be filed at a time earlier than the date an answer is due. WU seeks to add to Section 1.727(a) a requirement that motions to make allegations in the complaint more definite and certain must be filed within 15 days after service of a complaint by the Commission. USTA asserts that the Commission should not require the defendant to file a proposed order for adoption when opposing any motion, but should make such a filing permissive.

25. We wish to make clear that Section 1.727 was intended to encompass all motions made in formal complaint cases, including those mentioned in the old rules. Thus, deletion of prior Section 1.731 did not affect the right of a defendant to challenge the adequacy of the complaint or to file motions to make pleadings more definite and certain. We confirm MCI's understanding that motions to dismiss, as well as any other type of motion (except for motions to make definite, discussed later in this paragraph), may be filed at any time, including a date earlier than the date an answer is due. However, we agree with WU that motions to make allegations in the complaint more definite and certain must be filed before the responsive pleading is due, to permit defendants to draft an adequate response.[6] Thus we will adopt WU's suggestion that such motions must be filed within 15 days after service of the complaint. As to USTA's proposal that defendants not be required to file a proposed order for adoption when opposing any motion, we note that motions are filed by both complainants and defendants. No valid reason has been presented to justify different treatment for defendants and complainants who oppose motions. Moreover, the burden of requiring a proposed order from any party opposing a motion is minimal, since the party will already have prepared an opposition for filing. We will therefore reject USTA's suggestion in this regard.

I. *Formal complaints not stating a cause of action ; defective pleadings* (*Section 1. 728*).

26. This section provides that, when the original complaint has already been dismissed for failing to state a cause of action, amendments or supplements to that complaint will be treated as new complaints and must be filed within the statutory period of limitations. GTE urges that such a result is too harsh, and that such an amended complaint should be permitted to relate back to the filing date of the original complaint.

27. We do not agree with the position set forth by GTE. Under the formal complaint rules, both past and as now revised, a complainant is obligated to present facts which, if proven true, constitute a violation of the Communications Act or of a Commission order or regulation. *See, e.g.*, new Section 1.720(b). The complainant should be able to do so within the applicable limitations period, and it is thus unnecessary to permit a complainant to refile beyond this period in an attempt to state a cause of action. Section 1.728 merely ensures that an adequate claim is made within the limitations period.[7]

J. ***Interrogatories to parties (Section 1. 729).***

28. In this section we proposed to permit, for the first time, a form of limited, self-executing discovery. Under proposed Section 1.729, parties can serve written interrogatories on each other, during the period beginning with service of the complaint and ending 30 days after the reply due date, and answers would be mandated without need for Commission intervention. Prior Commission approval would be required for use of additional forms of discovery, such as the production of documents or the taking of depositions, under Section 1.730. We proposed that responses be filed within 14 days after service of the interrogatories, except that a defendant could respond within 30 days after service of the complaint, whichever period is longer.

29. In the NPRM, we noted that the lack of a formal discovery mechanism has, with some frequency, forced the staff to request information necessary to complete the record. However, complainants possess the burden of proof, and defendants must plead and prove affirmative defenses. Thus the parties, not only the staff, should be required to develop the record and move the case forward. By providing for limited, self-executing discovery in the form of interrogatories, we hope to encourage the parties to assume this burden and develop an accurate record for disposition of a complaint. However, we announced our intention to closely police this provision to prevent possible misuse; we now restate our commitment to this course of action. In addition, we anticipated that the need for more burdensome or costly means of discovery would be alleviated through this process. This section generated the most controversy: some parties expressed support for the NPRM proposal, others sought to expand or limit the scope of discovery, and others proposed only minor changes to the wording or requirements of the rule.

30. Ad Hoc seeks to expand the scope of self-executing discovery to include requests for production of documents, urging that they are often a better form of discovery. Cincinnati Bell urges the Commission either to make no change in current procedures or to adopt more comprehensive rules akin to the Federal Rules of Civil Procedure, allowing for a broader range of discovery. For example, it seeks the identification of individuals with knowledge of information relevant to the dispute and, thereafter, the production of relevant documents. After review of the documents, the individuals involved would be deposed. NATA would extend the self-executing mechanism so that all documents bearing upon the practice complained of would automatically be produced by the carriers.

31. While all other commenters agree that some form of discovery is necessary to create a proper record in formal complaint proceedings, Bell Atlantic, ITT Worldcom and USTS argue that the Commission should not adopt Section 1.729, and they propose that the scope of discovery be addressed instead at the status conference. Ameritech asserts that Section 1.729 will result in costly and inefficient proceedings and will delay resolution of complaints.

32. While a few parties seek expanded discovery, and some seek the elimination of self-executing discovery, the other commenting parties have suggested minor modifications to the section. A number of parties ask the Commission to alter and extend the timeframe in which interrogatories may be propounded, arguing that the time limits provided are too stringent. Ameritech suggests extending the time generally to 30 days, with 45 days after service of the complaint for defendants to respond, whichever is longer. GTE urges that the time for responding should be 30 to 60 days. Mountain States, NYNEX, Pacific and WU seek a 30-day response time, while BellSouth would extend the time to 20 days. Ad Hoc asks for extension based upon a showing of good cause, and MCI contends that responses to interrogatories should not be due earlier than the date the defendant is required to answer the complaint. MCI further urges that additional interrogatories should be allowed as a matter of right after the deadline if they are necessary follow-up questions to an earlier response.

33. A large number of commenters seek to limit the number of interrogatories that can be propounded. AT&T, Mountain States, Pacific, USTA, and NYNEX all seek specific limits ranging from 10 to 30 single interrogatories, while Southwestern Bell suggests 20 interrogatories with no more than two subparts each. Ameritech and GTE suggest that we limit the number of interrogatories but do not propose a specific number.

34. Further, a number of the parties commented on the need to protect confidential data from discovery.[8] They recognize that the rules advanced do not require disclosure of privileged matters. However, they argue that other confidential or proprietary information, trade secret data, or attorney work product should be discoverable only under adequate protection against unwarranted disclosure, such as by use of sealed records and protective orders or agreements, at least in circumstances where the complaint cannot be resolved without consideration of such information.

35. A number of other minor modifications have been suggested. Ameritech argues that discovery should not be served or required to be answered until after all dispositive procedural matters, such as motions to dismiss, have been resolved. BellSouth, Pacific, and WU ask us to revise Section 1.729(a) to read "(30) days *after* a reply is due to be filed" instead of "from" in order to avoid confusion. RCA seeks to rephrase Section 1.729 to encompass "any nonprivileged matter which is relevant to the proceeding" rather than only to the complaint. GTE argues that the Commission should add a rule setting forth procedures to compel a party to answer interrogatories, as well as requiring parties to supplement or correct answers. NATA suggests that the party resisting discovery should be compelled to seek a protective order. NYNEX asks the

Commission to reemphasize that it will closely supervise the use of these discovery tools to ensure that they are not abused. WU suggests that, rather than have all responses to interrogatories be included as part of the record, the moving party should introduce only those responses deemed relevant, and the opposing party should have a right to comment.

36. We have determined that the public interest will be served by adopting some of the suggested revisions, but do not believe it is in the best interest of the public or the parties to either expand the scope of self-executing discovery, or to eliminate discovery altogether, at the present time. We can, of course, revisit this determination as time and experience require. To understand why we believe retention of the proposed rule, as modified, is the preferred approach, it is necessary to understand the purpose of the formal complaint process, the curbs on abuse of discovery, and the availability of other forms of discovery when authorized.

37. In this regard, one must bear in mind the goals of this proceeding -- to improve efficiency, facilitate the prompt disposition of cases, and create a full record for resolution of the often complex issues raised in complaint cases. We have sought to keep the complaint process manageable and cost-effective, while improving the clarity of the procedures and the quality of the pleadings and the record. We have attempted to strike a balance between the relative ease, efficiency and cost of the various available discovery tools and the need to have a fair process which permits the development of the facts. The existing rules do not expressly provide for discovery, and the staff has often been required to solicit additional information from parties sufficient for disposition of the complaint.

38. We believe the availability of limited self-executing discovery through interrrogatories strikes the appropriate balance between the need to create a full and fair record on the one hand, and the need to avoid imposing more costly or burdensome discovery methods on parties on the other hand. Several parties have encouraged us to apply formal litigation tools to our formal complaint proceedings. However, using the full panoply of trial-type discovery tools similar to the Federal Rules of Civil Procedure in formal complaint proceedings would be ill-advised; the nature of the proceedings are essentially different. Litigation under the Federal Rules relies on notice pleading to raise issues on a wide variety of subjects. Facts are fleshed out in lengthy, complex, time-consuming and costly discovery, culminating in a trial if the suit is not settled or disposed of on summary judgment. Formal complaints, on the other hand, are limited to specific common carrier violations within this Commission's special expertise and often are resolved solely on the pleadings to save both time and costs. Further, the extensive discovery tools such as are provided under the Federal Rules have been criticized as being susceptible to abuse. *See , e. g.*, AT&T Comments at 2; Ameritech Comments at 3-4; Bell Atlantic Comments at 3; Cincinnati Bell Comments at 4; ITT Comments at 4-5; NYNEX Reply Comments at 6, n.7; Southwestern Bell Reply Comments at 5-7. *See also* Wright & Miller, Federal Practice and Procedure: Civil § 2001 (1987 Pocket Part); Sherman & Kinnard, Federal Court Discovery in the 80's, 95 F.R.D. 245 (1983); Federal Rules of Civil Procedure, 1983 Amendments, 97 F.R.D. 165, 189, 216 (1983); Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 522 (1980). We have thus resisted suggestions of the commenting parties to expand the available discovery tools, and thus render the complaint proceeding more like a court action or trial-type administrative hearing. We have similarly resisted the suggestion to deny the availability of self-executing discovery altogether, since there is a current need to provide a means of eliciting necessary factual data. The proposed rule strikes a balance on the continuum from no discovery to full discovery. This is especially true when viewed alongside Section 1.730 of the rules, establishing the right to request additional forms of discovery upon a showing of good cause, which permits the development of a fuller record where appropriate.

39. In addition, this procedure strikes the proper balance when considering that the formal complaint process is not the only forum available for resolution of disputes. The informal complaint process provides a vehicle for resolution or satisfaction of complaints against carriers with streamlined procedures without the availability of discovery to the parties. Trial-type hearings before Administrative Law Judges are available when oral testimony is essential to resolving the case. The formal complaint rules thus need be made neither too simplified nor overly trial-like. In many cases, the record will be complete based upon the pleadings alone, since the revisions adopted herein will require provision of support for factual assertions. In most other cases, interrogatories will be adequate to develop a full factual record. Additional discovery can of course be requested, including production of documents, taking of depositions, and requests for admissions, upon an appropriate showing of need. Thus, there is no need to formally incorporate expanded discovery procedures available on a universal basis at the present time.

40. The parties do not dispute that the Commission must possess adequate facts on which to render a decision in complaint cases; the controversy centers on the best means to compile such a record. The provision for limited self-executing discovery through interrogatories is both an appropriate and a conservative method to obtain such a record without resort to the costly and time-consuming full-blown discovery tools available in court or before an administrative law judge. While some parties may attempt to misuse the process, such matters can be strictly controlled on a case-by-case basis. Interrogatories are likely to yield information which is necessary and relevant to the dispute without a substantial expenditure of time or resources and, with adequate supervision by the Commission, use of the limited discovery should not be abused. In this regard, we stress that we will strictly monitor the discovery process. We admonish parties to limit interrogatories to relevant matter and to seek information of a specific nature; wholesale "fishing" expeditions will not be tolerated. Parties are warned that we will not permit misuse of these procedures and will invoke sanctions for abuse when appropriate. We also require that responses to interrogatories be made in good faith and that they be complete and accurate.

41. While we have decided to limit the type of self-executing discovery to interrogatories, we believe that some of the minor suggested changes to Section 1.729 have merit and should be adopted. We agree that the 14-day response time may be too short and may thus generate numerous requests for extensions of time. We also agree that responses to interrogatories should not be due earlier than the date the defendant is required to answer the complaint. Upon further reflection, therefore, parties will have 30 days to respond to interrogatories,

except that defendants are not required to respond until 15 days after filing an answer, whichever period is longer. However, we will not extend the deadline for serving interrogatories, which is 30 days after the reply due date, since Section 1.730(c) already provides that a party seeking additional discovery beyond the deadline can request permission to file out of time. Notwithstanding, we discourage parties from submitting interrogatories out of this time frame because it will delay the proceeding. Further, we agree that we should establish a limit to the number of interrogatories a party may serve without prior Commission approval, both to reduce the opportunity for abuse and to induce parties to carefully consider the relevance of the information requested. While any specific limit is of course arbitrary because the number of interrogatories needed varies from case to case, we have chosen as a reasonable balance to limit the request to 30 single interrogatories. Subparts of an interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Interrogatories exceeding this limit will be subject to motions to strike under our motions section, Section 1.727. Parties must obtain prior approval to propound additional questions, although it is difficult to imagine a situation where more interrogatories would be necessary.

42. We do not believe it is necessary that the formal complaint rules contain a specific provision to protect confidential data, as some parties suggest, since the Commission's Rules already provide for the protection of confidential information. Parties can request confidential treatment of discoverable matter under Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459. We note, however, that the parties are free to negotiate protective agreements between themselves, or may move for the imposition of a protective order to govern nondisclosure of confidential matter. Motions of this sort are subsumed by the general motions section, Section 1.727. Further guidelines in this area would therefore be redundant.

43. We agree with BellSouth, Pacific and WU that we should revise the wording of Section 1.729(a) to read "30 days *after* a reply is due to be filed" to avoid confusion, and that it should be rephrased in accordance with RCA's suggestion to encompass "any nonprivileged matter which is relevant to the pleadings." We also find merit in GTE's suggestion that responses to interrogatories objected to be obtained by the filing of motions to compel by the requester. Upon further reflection, we believe it will be more expeditious and more in line with the Federal Rules, which place the burden of obtaining compliance with a discovery request upon the requesting party, to require the party propounding the interrogatories to move to compel where the responding party has objected to a specific question. We will therefore revise proposed Section 1.729(c), which placed the burden of limiting or modifying the request on the responding party. However, we admonish parties to respond to requested interrogatories in good faith, and requesters should only move to compel a response where a review of the responses received reveals that an answer to a question objected to is truly necessary. The procedures for filing motions to compel are set forth in revised Section 1.729(c), which also incorporates the requirements of our general motions section, Section 1.727. Alternatively, the need for withheld information can be discussed and resolved during a status conference.

44. However, we believe the remaining suggestions may either generate delay or are already contemplated by other complaint rules, and they will not be adopted. For example, GTE requests that parties be required to supplement or correct responses to interrogatories. We need not impose this requirement as part of Section 1.729, because parties are already obligated, on a continual basis, to ensure the accuracy of all information submitted, under Section 1.720(g). Nor will we require a party resisting discovery to seek a protective order, as NATA requests, since parties are required by Section 1.729(b) to respond to interrogatories or to state objections thereto. Any special relief from unduly burdensome or irrelevant discovery requests can be obtained under our motions section, Section 1.727. Further, we do not believe that discovery should be held in abeyance pending disposition of procedural matters, as Ameritech suggests, since the exchange of information facilitates the framing of facts and issues and ultimate resolution or settlement of the dispute should not be delayed. Finally, responses to interrogatories will be part of the record for disposition. Therefore, it is unnecessary, as WU suggests, to introduce such information by motion.

K. ***Other forms of discovery (Section 1. 730).***

45. This section permits parties to request the Commission to approve additional forms of discovery, including but not limited to the production of documents and the taking of depositions, upon a showing of good cause. Because prior approval is required for such further discovery, potential abuses of our processes can be strictly controlled.

46. Pacific suggests that we amend Section 1.730(c), as we did for Section 1.729, discussed in the previous section, to change the word "from" to "after" to avoid confusion, and RCA seeks to rephrase the section to encompass discovery relevant to the resolution of the proceeding, not merely the complaint. MCI and NYNEX request modification of Section 1.730 to clarify that motions for additional discovery include interrogatories. WU and RCA urge the Commission to adopt a longer deadline for seeking discovery under Section 1.730. They contend that the deadline should be extended to 30 days after responses to interrogatories are filed, since parties may not perceive a need for further discovery prior to that time. These suggestions will serve to clarify the section, and we will therefore adopt all of them.

47. We do not adopt the remaining proposals. GTE suggests that the Commission establish a more precise standard than "good cause" for authorizing additional discovery, or that the rule should refer to a body of law as precedent. We believe the standard is sufficient, and note that approval of additional discovery can only be addressed on a case-by-case basis. Of course, the parties are free to submit legal authority under other similar provisions, such as our hearing rules or the Federal Rules of Civil Procedure, to support by analogy a motion for such discovery. Southwestern Bell asserts that, at any time live testimony is needed, a complaint should be designated for hearing before an administrative law judge, and that depositions should not be authorized in the formal complaints rules. We disagree with this position. The complaint rules do not affect the availability of other procedures, such as the Commission's hearing procedures, when they are the appropriate mechanism for resolution of matters in controversy. However, the taking of depositions in complaint cases may lead to prompt settlement or resolution of a dispute without the need to conduct a full trial-type administrative hearing and, therefore, should not be totally

prohibited in formal complaint cases. In any event, in our experience the need for depositions has been rare in complaint cases. Finally, Southwestern Bell asks us to hold the party seeking discovery responsible for the costs therefor. This is at variance with normal standards of discovery and will be considered only in accordance with the Commission's statutory power to award such relief. Insofar as Southwestern Bell's suggestion relates to a concern about potential abuse of our discovery process, the Commission will strictly monitor discovery to prevent such abuse.

L. ***Other required written submissions (Section 1. 731).***

48. New Section 1.731 embodies the current practice of requesting briefs from the parties, within the Commission's discretion. AT&T requests that parties be allowed to file briefs as a matter of right and not only on request. We believe this is unnecessary and may prolong proceedings where the record permits a decision without the need for final briefs. As we noted in the NPRM, while such briefs are helpful to focus issues or facts, they are normally needed only in more complex cases. Thus, we believe the filing of such briefs should be controlled by the Commission. However, parties can always request leave to file such briefs when the Commission has not expressly authorized them.

M. ***Status conference (Section 1. 732).***

49. In the NPRM, we proposed a new rule formalizing the existing practice of scheduling status conferences. These conferences serve a variety of purposes, including the narrowing of issues, eliciting additional information, and facilitating settlement. While it endorses the NPRM in this regard, USTA urges the Commission to use Rule 16 of the Federal Rules of Civil Procedure as a guide to such conferences, and to encourage alternative dispute resolution when both parties agree, including mediation, arbitration and nonbinding summary hearings on the record. We referred to the Federal Rules of Civil Procedure for guidance in formulating our proposal, but have modified its content and objectives, which are geared to pretrial activities, to be more appropriate to the formal complaint process. USTA does not explain what our proposal does not accomplish that Rule 16 does. However, we believe the NPRM does fit in with its objectives, as tailored to formal complaints. Further, we of course urge parties to engage in mutually agreeable dispute resolution, which can be conducted outside the formal complaint process, and on occasion we have encouraged parties to do so. NATA has questioned whether status conferences are to be conducted on or off the record, although it does not urge us to use either form. We emphasize that such conferences are normally held as informal proceedings to encourage candor by the parties or their representatives. However, nothing in the rules precludes parties from requesting that status conferences be conducted on the record.[9]

N. ***Specifications as to pleadings, briefs, and other documents ; subscription (Section 1. 733).***

50. This section sets forth the format in which pleadings must be submitted, such as the requirement that pleadings exceeding ten pages include a summary and table of contents. We also proposed to eliminate the requirement of verification and to rely instead on the signature of counsel as an affirmation of the accuracy of the pleading, to be consistent with federal court practice.

51. MCI has urged the Commission to retain the requirement that the complaint be verified, because it is the complainant and not counsel who will be most familiar with the facts. It adds that verification by complainant would protect counsel in situations where clients may be motivated to prosecute false claims. It is true that the parties, and not their legal representatives, are the source for the facts underlying disputes. However, the requirement in Section 1.733(c) mandates that the signer will have investigated the facts, and the signature, in essence, is an affirmation that the facts are correct to the best of the signer's knowledge and belief. We are merely substituting a simpler form of attestation, like that used in federal courts, for the verification. Accordingly, we will not adopt MCI's suggestion. GTE has asked that we consider adopting a provision for sanctions for violation of this method of attestation. We do not believe such a general provision is necessary because such sanctions are provided in other Rules sections. *See , e. g.*, 47 C.F.R. §§ 1.24 and 1.80. Requests for sanctions can be made by motion in individual cases. Finally, Mountain States asserts that it is unnecessary to include a summary and a table of contents for complaints, cross complaints, answers, and replies. We disagree. Where such pleadings are lengthy, a summary and a table of contents facilitate better understanding of the pleading. We therefore do not adopt Mountain States' suggestion.

O. ***Copies ; service ; separate filings against multiple defendants defendants (Section 1. 734).***

52. This section specifies the number of copies to be filed and the manner of service of the initial complaint and subsequent pleadings. We proposed to continue the requirement that the Commission serve the initial complaint, but that all other pleadings would be served by a party directly on all other parties, including amended, cross and supplemental complaints, which are now served by the Commission.

53. Three parties commented regarding the service of complaints by the Commission. ACTA suggests that complaints may be served on carriers directly by the complainant. ACTA continues that, absent a request in the complaint that the Commission serve the complaint, the time for answers should run from the date the complaint is filed. NATA similarly asserts that complainants should have the option of serving complaints themselves, thereby advancing the beginning of the time period for answering. BellSouth urges us to require carriers to register an agent for service and that such service be deemed complete upon actual receipt by the agent.

54. We have decided to retain the provision that initial complaints be served by the Commission for a number of reasons. Section 208 of the Communications Act, 47 U.S.C. § 208, requires the Commission to forward complaints to the common carrier. This permits staff review to determine whether the complaint meets the minimum pleading standards sufficient to accept it for filing. Service by complainants of the initial pleading would deny us the opportunity to conduct this essential threshold review. We further believe that requiring receipt before service is complete would serve no useful purpose. Pursuant to Section 1.47(f) of the Commission's Rules, 47 C.F.R. § 1.47(f), service by mail is complete upon mailing. We have served complaints by mail for many years, and it has proven to be an effective mechanism for completing service. We note that, in infrequent circumstances where

mailing delays severely affect the response period, time extensions can be requested. Finally, we note that carriers are required, under 47 C.F.R. § 1.5, to furnish the Commission with an address for service and to assure that Commission documents delivered to that address will promptly reach the carrier. We remind carriers of this obligation, and urge them to maintain an updated service address at all times.

P. *Miscellaneous suggestions.*

55. The parties have made a number of suggestions not relating to any specific rule proposal. Pacific asserts that prior exhaustion of the informal complaint process should be required as a prerequisite to filing a formal complaint. We disagree. At the outset, we note that this suggestion is beyond the scope of the NPRM. Further, the formal and informal complaint procedures are designed to provide separate vehicles for satisfaction of complaints against carriers. The former is a restricted adjudicative proceeding in which a lengthy record is sometimes generated, and which often deals with extremely complex factual or legal questions. The informal process is, as it sounds, an informal and simple vehicle to address concerns of a more straightforward nature. The subject of a formal complaint is thus not always suitable for resolution as an informal complaint. ACTA, for its part, seeks prompt disclosure of facts in informal complaint proceedings by permitting parties filing informal complaints to propound written questions to be answered by the carrier. Again, this request is beyond the scope of this proceeding, which is limited to rules applicable to formal complaints.

56. Ameritech seeks a provision requiring that formal complaints be submitted with numbered paragraphs to facilitate the framing of answers. This provision is already found in Section 1.733(b). Mountain States contends that in deleting Section 1.713 the Commission has failed to provide for settlement or withdrawal of a complaint prior to a disposition on the merits. As discussed herein, new Section 1.727, dealing with motions, is sufficiently broad to encompass motions to withdraw or dismiss. Further, deletion of Section 1.713 does not relieve parties of the obligation to advise us of the status of the proceeding, including but not limited to whether the complaint has been satisfied or will be withdrawn, or whether the parties have agreed to dismiss the case.[10]

57. MCI urges us to rule that, to the extent no inconsistencies exist between the Commission's Rules and the Federal Rules of Civil Procedure, the latter will apply. NATA also asks us to adopt the Federal Rules of Civil Procedure as a model. While we have consulted the Federal Rules and our hearing rules in proposing this revision, we have resisted attempts to turn the formal complaint process into federal court litigation. Parties desiring traditional court litigation, rather than an administrative law setting, may of course seek redress in the appropriate court rather than at this Commission. BellSouth has also suggested a change in the procedural structure of the rules to render them more like court proceedings. It recommends that the parties should file notice pleadings, followed by limited discovery and a status conference. Thereafter, evidence would be filed, a second conference held, and briefs filed if necessary. We have already discussed the reasons why we do not rely on notice pleading in complaint cases (*see* para. 8, *supra).* The procedure suggested by BellSouth appears to be unnecessarily complex for our purposes. In many cases discovery or further evidentiary submissions will not be needed, and the matter can be resolved on the pleadings. Parties are always free to suggest modifications to our procedures, which we would follow if they are appropriate to an individual case.

58. NATA requests that, where documents accompanying the complaint consist of material obtained from or available to the defendant, it should not be necessary to serve duplicate copies of that material on the carrier. We decline to adopt this suggestion. All pleadings should contain the same documentation to assure that all parties clearly know what has been submitted. Further, we do not believe that this poses a hardship on individual complainants.[11]

III. PAPERWORK REDUCTION ACT - FINAL ANALYSIS

59. As discussed in Section IV below, the rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, nor to increase or decrease burden hours imposed on the public. No comments were filed regarding this analysis. However, because the initial complaint rules were adopted prior to the Act's passage and were, thus, not submitted for approval to the Office of Management and Budget, we will submit these revised rules for approval.

IV. REGULATORY FLEXIBILITY ACT - FINAL ANALYSIS

60. *Need for Rules and Objective.* We have revised the formal complaint rules to improve efficiency, to facilitate a prompt resolution of such cases, to clarify and improve the rules and present them in a more orderly and understandable fashion, and to promote a well-developed and complete record for disposition of complaints. Our objective is to adopt amendments to the rules which will facilitate the prompt resolution of complaints, improve processing, and promote a fuller and better record in such cases.

61. *Issues Raised by the Public In Response to the Initial Analysis.* We received one comment, by USTA, which disagrees with the Initial Analysis which found that the proposed rules would not have a significant economic impact on small entities because the proposed changes would not alter existing burdens of proof.[12] While USTA supports our proposal to limit discovery to written interrogatories, USTA asserts that the addition of proposals to permit self-executing discovery procedures will affect the administrative burdens imposed on small carriers, because these carriers will potentially suffer the greatest hardship in complying with extensive discovery requests. It asks the Commission to allow small carriers greater latitude in meeting the requirements imposed by the discovery rules. Regarding USTA's concerns, we noted in the NPRM that, although the earlier formal complaint rules did not expressly provide for discovery, the parties have always been ultimately responsible for proving and supporting their positions and have often been required to provide additional information beyond the initial set of pleadings to prove a point or defend a position. The adoption of a limited vehicle for discovery through interrogatories merely formalizes this tool as a means for achieving an adequate record for disposition. However, we have taken into

account USTA's concerns in our deliberations over the rules which we are adopting herein. As a result of its comment, and those of other parties, we have modified our discovery proposal to ensure that it is not burdensome by limiting the number of interrogatories which can be propounded without our approval and by enlarging the time to respond to such questions. We have also reemphasized our commitment to closely monitor this discovery process to prevent abuse or hardship.

62. *Alternatives that would lessen impact.* We initially concluded in the NPRM that there were no satisfactory alternatives which would lessen the impact on small entities, since the alternative would be to take no steps to improve the complaint process. We have reduced these burdens whenever possible, but have retained the rules substantially as proposed in order to provide the least intrusive means for parties to develop an accurate and adequate record for disposition of formal complaints. We will continue to examine alternatives or revisions in the future with the objective of creating the most efficient and least intrusive means for developing a record in formal complaint cases.

V. CONCLUSION AND ORDERING CLAUSES

63. We conclude, after careful consideration, that the new rules adopted in this *Report and Order* promote the public interest by restructuring and revising the formal complaint rules to promote a fuller record in a shorter time frame for disposition of complaint cases. The rules we are adopting today will be applicable to all complaints filed after the effective date of the rules. We note that parties can request that the new rules be utilized for unresolved proceedings now pending before us, on a case-by-case basis.

64. Authority for this Rule Making is contained in Sections 1, 4(i), 208 and 403 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 208 and 403, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

65. Accordingly, IT IS ORDERED that the Rules and Regulations of the Federal Communications Commission ARE AMENDED in the manner indicated in Appendix B below, effective **May 13, 1988.**

66. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

List of Commenting Parties

(Asterisk (*) denotes party also filed a reply)

* 1. Ad Hoc Telecommunications Users Committee (Ad Hoc).
* 2. Alternative Carrier Telecommunications Association (ACTA).
3. American Telephone and Telegraph Company (AT&T).
* 4. Ameritech Operating Companies (Ameritech).
* 5. Bell Atlantic Telephone Companies (Bell Atlantic).
* 6. BellSouth Corporation (BellSouth).
7. Cincinnati Bell Telephone Company (Cincinnati Bell).
8. GTE Service Corporation and its affiliated domestic telephone operating companies (GTE).
9. ITT World Communications Inc. (ITT Worldcom) and United States Transmission Systems, Inc. (USTS).
* 10. MCI Telecommunications Corporation, MCI International, Inc., Western Union International, Inc., and Satellite Business Systems (MCI).
* 11. Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (Mountain States).
12. North American Telecommunications Association (NATA).
* 13. NYNEX Telephone Companies (NYNEX).
14. Pacific Bell and Nevada Bell (Pacific).
* 15. RCA Global Communications, Inc., and RCA American Communications, Inc. (RCA).
* 16. Southwestern Bell Telephone Company (Southwestern Bell).
* 17. United States Telephone Association (USTA).
18. Western Union Telegraph Company (WU).

APPENDIX B

Part 1 (Practice and Procedure) of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. § 1.47(b) is amended to remove the phrase "including supplemental, cross, and amended complaints."

3. § 1.713 is removed.

4. The Table of Contents for Formal Complaints, §§ 1.720-1.734, is revised to read as follows:

FORMAL COMPLAINTS

Sec.
1.720 General pleading requirements.
1.721 Form and content.
1.722 Damages.
1.723 Joinder of complainants and causes of action.
1.724 Answers.

1.725 Cross complaints.

1.726 Replies.

1.727 Motions.

1.728 Formal complaints not stating a cause of action; defective pleadings.

1.729 Interrogatories to parties.

1.730 Other forms of discovery.

1.731 Other required written submissions.

1.732 Status conference.

1.733 Specifications as to pleadings, briefs, and other documents; subscription.

1.734 Copies; service; separate filings against multiple defendants.

5. § 1.720 is added to read as follows:

§ 1.720 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer and reply but may also include other written submissions such as briefs and written interrogatories. All written submissions, both substantive and procedural, must conform to the following standards:

(a) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.

(b) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.

(c) Facts must be supported by relevant documentation or affidavit.

(d) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(e) Opposing authorities must be distinguished.

(f) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(g) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(h) Specific reference must be made to any tariff provision relied on in support of a claim or defense. Parties are encouraged to provide copies of the tariff or relevant portions thereof.

6. § 1.721 is revised to read as follows:

§ 1.721 Format and content.

(a) A formal complaint shall contain:

(1) the name of each complainant and defendant;

(2) the occupation, address and telephone number of each complainant and, to the extent known, each defendant;

(3) the name, address, and telephone number of complainant's attorney, if represented by counsel;

(4) citation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated;

(5) a complete statement of facts which, if proven true, would constitute such a violation;

(6) complete identification or description, including relevant time period, of the communications, transmissions, services, or other carrier conduct complained of and nature of the injury sustained;

(7) the relief sought, including recovery of damages and the amount of damages claimed, if known; and

(8) whether suit has been filed in any court or other government agency on the basis of the same cause of action.

(b) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

_____
Complainant,

v. File No. (To be inserted by the Common Carrier Bureau)

_____
Defendant.

COMPLAINT

TO: The Commission

The complainant (here insert full name of each complainant and, if a corporation, the corporate title of such complainant) shows that:

1. (Here state occupation, post office address, and telephone number of each complainant).

2. (Here insert the name, occupation and, to the extent known, address and telephone number of defendants).

3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give a full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

_____ _____
(Date) (Name of each complainant)

_____
(Name, address, and telephone number of attorney, if any)

7. § 1.722 is revised to read as follows:

§ 1.722 Damages.

(a) In case recovery of damages is sought, the complaint shall contain appropriate allegations showing such evidence that will identify, with reasonable certainty, the amount of damages for which recovery is sought.

(b) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded, however, upon a Supplemental complaint based upon a finding of the Commission in the original proceeding. Provided *that* :

(1) If recovery of damages or overcharges is first sought by supplemental complaint, such supplemental complaint must be filed within, and recovery is limited to, the statutory periods of limitations contained in Section 415 of the Communications Act;

(2) A claim for recovery of damages contained in a supplemental complaint based on a finding of the Commission in the original proceeding which meets the requirements of paragraph (a) of this section shall relate back to the filing date of the original formal complaint if:

(i) the original complaint clearly and unequivocally requests the recovery of damages (even if the precise amount and other specific details are unknown), and

(ii) such supplemental complaint is filed no later than 60 days after public notice (as defined in Section 1.4(b) of the Rules) of a decision on the merits of the original complaint.

8. § 1.723 is revised to read as follows:

§ 1.723 Joinder of complainants and causes of action.

(a) Two or more complainants may join in one complaint if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act.

(b) Two or more grounds of complaint involving the same principle, subject, or statement of facts may be included in one complaint, but should be separately stated and numbered.

9. § 1.724 is revised to read as follows:

§ 1.724 Answers.

(a) Any carrier upon which a copy of a formal complaint, supplemental complaint, amended complaint, or cross complaint is served under this subpart shall answer within 30 days of service of the pleading to which the answer is made, unless otherwise directed by the Commission.

(b) The answer shall advise the parties and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any party failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(c) A party shall state concisely its defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. When a pleader intends in good faith to deny only part of an averment, the pleader shall specify so much of it as is true and shall deny only the remainder. The pleader may make its denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits. When the pleader intends to controvert all averments, the pleader may do so by general denial.

(d) Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are deemed to be admitted when not denied in the responsive pleading.

10. § 1.725 is revised to read as follows:

§ 1.725 Cross complaints.

A cross complaint, seeking any relief within the jurisdiction of the Commission against any carrier which is a party (complainant or defendant) to the proceeding, may be filed by a defendant with its answer. For the purpose of this subpart, the term "cross complaint" shall include counterclaim.

11. § 1.726 is revised to read as follows:

§ 1.726 Replies.

Within 10 days after service of an answer, a complainant may file and serve a reply which shall be responsive to matters contained in the answer or amended answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defenses set forth therein.

12. § 1.727 is revised to read as follows:

§ 1.727 Motions.

(a) A request to the Commission for an order shall be by written motion, stating with particularity the grounds and authority therefor, and setting forth the relief or order sought.

(b) A motion that the allegations in the complaint be made more definite and certain shall be filed within 15 days after service of a complaint by the Commission.

(c) Where the matter involved in the motion is one of procedure or discovery, the moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(d) A party opposing any motion concerning procedure or discovery shall also provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(e) Oppositions and replies to oppositions shall be filed in accordance with the pleading and filing period requirements of § 1.45(a) and (b).

13. § 1.728 is revised to read as follows:

§ 1.728 Formal complaints not stating a cause of action; defective pleadings.

(a) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within the statutory periods of limitations of actions contained in Section 415 of the Communications Act.

(b) Any other pleading filed in a formal complaint proceeding not in conformity with the requirements of the applicable rules in this part may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

14. § 1.729 is revised to read as follows:

§ 1.729 Interrogatories to parties.

(a) During the time period beginning with service of the complaint and ending 30 days after the date a reply is due to be filed, any party may serve any other party written interrogatories, to be answered in writing by the party served or, if the party served is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. Parties shall propound no more than 30 single interrogatories without prior Commission approval. Subparts of an interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. This procedure may be used for the discovery of any nonprivileged matter which is relevant to the pleadings. Interrogatories may not be employed for the purpose of delay, harrassment or to obtain information which is beyond the scope of permissible inquiry relating to the subject matter of the pleadings.

(b) Parties on whom interrogatories are served shall respond without waiting to be ordered to do so by the Commission. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers shall be signed by the person making them. The party on whom the interrogatories were served shall serve a copy of the answers and objections, if any, within 30 days after service of the interrogatories, except that a defendant may serve answers or objections within 15 days after filing its answer to the complaint, whichever period is longer. On proper motion being made, the Commission may allow a shorter or longer time for the filing of answers or objections.

(c) Where the responding party has failed to respond, or has objected, to any interrogatory, the party propounding the interrogatories may, within 15 days of the date the response was due if no response is filed or the date of service of the objection, move to compel a response thereto. The motion should state with specificity the relevance of and necessity for the requested information and must also comply with the requirements of § 1.727 hereof, pertaining to motions generally. Alternatively, the party may request that answers to interrogatories be discussed during a status conference, pursuant to § 1.732 hereof.

(d) Interrogatories and responses or objections thereto must be filed with the Commission in accordance with § 1.734.

15. § 1.730 is revised to read as follows:

§ 1.730 Other forms of discovery.

(a) If a party believes it needs to engage in some form of discovery other than by written interrogatories under § 1.729, including but not limited to the production of documents, the taking of depositions, or the propounding of additional interrogatories, the party may file a motion with the Commission requesting that such discovery be permitted. The motion should state with specificity the type of discovery requested, the information which is expected to be elicited, the relevance of such information to the resolution of the proceeding, and must also comply with the requirements of § 1.727 hereof, pertaining to motions generally. Such motions will not be routinely granted except for good cause shown.

(b) The party from whom the discovery is sought may file an opposition to a motion seeking discovery within 10 days after the motion is filed. No reply is permitted.

(c) Motions seeking discovery may be filed only during the period beginning with the filing of the complaint and ending 30 days after the date a reply is due to be filed or 30 days after responses to interrogatories under § 1.729 are filed, whichever period is longer, except where the movant demonstrates that the need for such discovery could not, even with due diligence, have been ascertained within this period.

16. § 1.731 is revised to read as follows:

§ 1.731 Other required written submissions.

(a) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citation to the record, and supported by relevant authority and analysis.

(b) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

17. § 1.732 is revised to read as follows:

§ 1.732 Status conference.

(a) In any complaint proceeding, the Commission may in its discretion direct the attorneys and/or the parties to appear before it for a conference to consider:

(1) simplification or narrowing of the issues;

(2) the necessity for or desirability of amendments to the pleadings, or of additional pleadings or evidentiary submissions;

(3) obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(4) settlement of the matters in controversy by agreement of the parties;

(5) the necessity for and extent of discovery;

(6) the need and schedule for filing briefs, and the date for further conferences; and

(7) such other matters that may aid in the disposition of the complaint.

(b) While a conference normally will be scheduled after the reply has been filed, or after the filing date for replies if no reply has been filed, any party may request that a conference be held at any time after the complaint has been filed.

(c) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(d) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel present.

18. § 1.733 is revised to read as follows:

§ 1.733 Specifications as to pleadings, briefs, and other documents; subscription.

(a) All papers filed in any formal complaint proceeding must be drawn in conformity with the requirements of §§ 1.49 and 1.50.

(b) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(c) The original of all pleadings and other submissions filed by any party shall be signed by that party, or by the party's attorney. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose.

19. § 1.734 is revised to read as follows:

§ 1.734 Copies; service; separate filings against multiple defendants.

(a) Complaints may generally be brought against only one named carrier; such actions may not be brought against multiple defendants unless the defendant carriers are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

(b) The complainant must file an original plus three copies of the complaint with the Commission. However, if the complaint is addressed against multiple defendants, complainant shall supply three additional copies of the complaint for each additional defendant.

(c) Generally, a separate file is set up for each defendant. An original plus two copies shall be filed of all pleadings and documents, other than the complaint, for each file number assigned.

(d) The Commission will serve a copy of any formal complaint filed with it on the named defendant, together with a notice of the filing of the complaint. Such notice shall call upon the defendant to satisfy the complaint or to answer the complaint in writing within the time specified in the notice.

(e) All subsequent pleadings and briefs filed in any formal complaint proceeding, including any supplemental, amended, or cross complaint, as well as all letters, documents or other written submissions, shall be served by the filing party on all other parties to the proceeding, together with a proof of such service in accordance with the requirements of § 1.47.

(f) The parties to any complaint proceeding may be required to file additional copies of any or all papers filed in the proceeding.

20. § 1.735 is removed.

FOOTNOTES

[1] Amendment of Rules Governing Procedures to be followed where Formal Complaints are filed against Common Carriers, 52 Fed. Reg. 1939 (January 16, 1987).

[2] Only Cincinnati Bell has suggested that the Commission should consider, as one option, making no change in the current procedures. Cincinnati Bell Comments at 2.

[3] For example, the parties have asserted that the proposed amendments "generally succeed in clarifying and presenting the Commission's Rules in a more orderly and understandable fashion" (Ameritech Comments at 2), that they support most of the detailed proposals made by the Commission (AT&T Comments at 1; Bell Atlantic Comments at 1; Mountain States Comments at 1), and "believe that an overhaul of the existing rules is long overdue" (MCI Comments at 2). NATA has stated (NATA Comments at 2) that it "applauds the direction of the proposed changes to the Commission's formal complaint rules", while RCA notes that the procedures proposed in the NPRM fill the gap between a purely paper record and a formal trial-type hearing (RCA Comments at 1-2). WU states that it "welcomes the Commission's initiative and believes that, in general, the revised rules will make for fairer and more efficient disposition of formal complaints by the Commission" (WU Comments at 1). The other commenting parties have set forth similar support for the NPRM objectives and for the proposals to obtain those objectives, with the modifications discussed, in their comments and replies.

[4] Section 415(b) provides: "All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues. . . ."

[5] Southwestern Bell has properly pointed out, in its Reply Comments at 8-9, that the claimant can avoid any limitations problem either by including the plea for damages as part of the initial complaint or by filing the supplemental complaint prior to the end of the limitations period even if there has been no decision on the merits.

[6] Failure to obtain a prompt ruling on this motion does not relieve defendant of the obligation to answer the complaint within the specified time period.

[7] Of course, if a complaint is amended, either voluntarily or by Commission directive, prior to any action by the Commission dismissing for failure to state a cause of action, and such amendment cures the defect in the initial pleading, this section would be inapplicable.

[8] Ad Hoc, Concinnati Bell, Mountain States, RCA, Southwestern Bell and USTA.

[9] Under such circumstances, the parties' verbal representations will not necessarily be reduced to a formal transcript but could be used against them. If a party requests a formal transcript, and we grant that request, the requesting party will bear the costs of transcribing the conference and of supplying the requisite copies of the transcript.

[10] As we stated in the NPRM, Section 1.713, requiring Commission authorization prior to satisfaction of certain complaints, could be eliminated since it duplicated existing carrier obligations. The reason for requiring such authorization was to ensure that the settlement was not, in itself, a violation of the Communications Act. However, since a carrier is under a continuing obligation to comply with the Act, this requirement is superfluous. Because the parties must notify the Commission, under new Section 1.727, of the status of the complaint, we will continue to be generally aware of the terms of settlement, satisfaction, or withdrawal of a complaint and can take action if a violation of the Act is apparent.

[11] Finally, MCI asks the Commission to commit to address and resolve all complaints within 120 days of filing or as soon thereafter as possible. We are committed to resolving formal complaints as expeditiously as possible, but placing a timetable into regulation is impractical. The speed of disposition turns on the length and complexity of the proceeding and in addition may depend on the outcome of other proceedings. As MCI is undoubtedly aware, court cases often take considerably longer than the time proposed for resolution of formal complaint cases. We, therefore, decline to impose an arbitrary deadline applicable to all cases. MCI also asks that we be responsive to setting cases for hearing before an administrative law judge when necessary. Complaints will be designated for trial-type hearing in appropriate cases.

[12] Because of the nature of local exchange and access services, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth herein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible, consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies. *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, CC Docket No. 86-182, 2 FCC Rcd 5770, n.55 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-121

In the Matter of

Amendment of Part 73 of the Commission's Rules to permit short-spaced FM station assignments by using Directional Antennas — RM-6015

NOTICE OF PROPOSED RULE MAKING

Adopted: February 25, 1988; Released: March 30, 1988

By the Commission: Commissioner Quello concurring and issuing a separate statement.

INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes for consideration changes to the Commission's rules that would in certain circumstances permit the use of short-spaced FM transmitting antenna sites, use of FM directional antennas by short-spaced stations, and related matters.[1] This *Notice* is an outgrowth of the *Notice of Inquiry* (*Inquiry*) released on May 26, 1987, that inaugurated this proceeding.[2] After reviewing the comments received in response to the *Inquiry*, we have concluded that additional provisions in the rules to permit use of short-spaced antenna sites, including use of FM directional antennas, has merit and could provide greater flexibility in the selection of FM station antenna sites, resulting in improved service to the public.

2. The *Inquiry* explored a number of technical issues related to matters that are the subject of this *Notice*. Specifically, the *Inquiry* addressed matters related to use of short-spaced antenna sites, use of directional FM antennas in order to reduce required geographic separation between co-channel and adjacent channel stations and allotments, antenna design criteria, treatment of antenna height, and protection of existing stations.

BACKGROUND

3. The Commission's rules prescribe different procedures in making non- commercial FM station assignments on channels 200-220 and commercial FM stations on channels 221-300. In the case of non-commercial applications, proposed stations must provide protection to co-channel and adjacent channel stations in accordance with the standards prescribed in Section 73.509. [3] Generally, in applying these standards, calculations are performed to determine whether the interfering signal contours of the proposed station and neighboring adjacent and co-channel stations overlap the protected contours of each other.[4] Non-commercial FM stations also are routinely permitted to use directional antennas to avoid contour overlap with other stations.

4. In the case of commercial FM stations, applications to construct FM broadcast stations may be filed only for the communities and on the channels contained in the Table of Allotments in Section 73.202(b). If a channel allotment does not exist for a desired community, it is necessary to add the community to the Table through a rule making proceeding before an application may be filed. With limited exceptions (*see infra* para. 9), FM allotments and FM stations must comply with the distances of minimum geographic separation between co-channel and adjacent channel stations and allotments as prescribed in Section 73.207 of the FCC rules.[5]

5. The minimum separation distances that are applied to commercial FM stations and allotments were derived through calculations that assumed maximum facilities (*i. e.*, maximum power and antenna height above average terrain) using non-directional antennas for each of the commercial station classes. The distances to the protected contours and the interfering contours were calculated in a fashion similar to that which is applied for the assignment of non-commercial stations.[6] Although commercial stations may use directional antennas for other various reasons, they currently are not allowed to use such antenna systems for the purpose of creating new short-spacing situations.[7] Reasons for not allowing such short-spacing in the past were: (1) use of tables of minimum separation had the advantage of simplifying analysis of potential interference for new applications or proposed allotments since only simple calculations of distances between stations and allotments were required; and (2) more importantly, this procedure ensured that stations initially operating at less than maximum permitted facilities for their class would have the opportunity to increase to maximum facilities at a future date.

COMMENTS

6. In response to the *Inquiry*, the Commission received 35 comments, 28 of which generally favored some form of short-spacing provision for FM station assignment.[8] Many of the supporters, however, anticipate a rule making action that would fundamentally alter the current FM channel allotment process. Several broadcast station licensees support FM short- spacing because they believe that they would be allowed to use directional antenna systems to "upgrade" their stations to a higher station classification, *e. g.*, from Class A to Class B1 or C2. On the other hand, some of the opponents generally fear that such provisions might result in increased interference due to imprecision in propagation prediction methodology.

7. Commenters that favor the proposal stress the improvement in service they believe would be possible as a result of the additional flexibility for site selection. The comments of Beasley Radio Company (WPHR) and CBS, Inc. reflect this view and are characteristic of most licensees commenting in this proceeding.

8. Contrary to that support, Group M Communications, Inc., licensee of WIXL-FM, opposes the notion of short-spacing provisions. It believes that existing stations using directional antennas are inherently inferior, as reflected in broadcast audience ratings. The Hearst Corporation opposes short-spacing because of the potential for increased competition, if such short-spacing should eventually lead to the assignment of additional stations. The Association of Maximum Service Telecasters (MST) and the National Association of Broadcasters (NAB) oppose short-spacing

because of their concern of possible increased interference due to imprecision in propagation prediction methodology that would be used to "drop in" directionalized stations. MST also is concerned that the short-spacing of FM assignments will lead to the short-spacing of FM channel allotments, and that this will inevitably lead to television channel allotment short-spacing, of which it disapproves.[9] Doug C. McDonnell, consulting engineer, supports short-spacing on a case-by-case waiver basis rather than on a routine basis for all stations.

9. In summary, the comments generally support the proposition of additional rule provisions for use of short-spaced antenna sites.

DISCUSSION

10. The Commission has generally required rigid compliance with its rules prescribing the distances of minimum separation between commercial stations and allotments, except under two sets of circumstances. These exceptions concern "grandfathered" stations and use of designated "antenna farms."[10] In addition, site restrictions are sometimes encountered by applicants owing to matters such as FAA clearance difficulties, government ownership and restrictions on the use of desirable sites, and environmental concerns. Moreover, not all remaining potential sites may be acceptable under the Commission's current rules because they would be short-spaced to other co-channel and adjacent channel stations and allotments. Thus, for a combination of reasons, applicants may be forced to select an antenna site that does not result in optimum service to the public or that is not the most economical site on which to construct the facility.

11. Circumstances have changed substantially over the past two decades, and the general proscriptions in the rules regarding use of short- spaced antenna sites may no longer be in the public interest. There is no dispute that the FM service has matured and is, in fact, the dominant aural broadcast medium. In addition to economic or other considerations, increased flexibility to use short-spaced antenna sites could enhance and expand service to the public in some circumstances. For these reasons, we now propose to amend the rules to make general provisions for use of short- spaced antenna sites, including use of directional antennas, for the purpose of providing interference protection to adjacent and co-channel FM stations and allotments.[11]

12. *Short - spaced assignments.* Among the options considered here is a proposal to permit use of short-spaced antenna sites for new commercial FM stations, provided that sufficient interference protection is provided to adjacent and co-channel stations and allotments. Proposed facilities at short-spaced antenna sites would be permitted to employ either non-directional or directional antennas. In the cases where a non-directional antenna is used, restrictions on the effective radiated power or height of the antenna above average terrain (HAAT), or both, would be imposed on the proposed facility where necessary in order to provide requisite interference protection to neighboring stations and allotments. Such restrictions would have to be consistent with the class of the associated allotment for which the application is filed.[12] In cases in which a licensee currently operating on an allotment wants to change to a more favorable but short-spaced antenna site, and use a directional antenna, that licensee must suppress the radiated power to avoid any overlap of the station's contours with the protected contours of neighboring stations or allotments.

13. Use of directional antennas designed to provide protection against interference in the direction of the short-spacing could offer licensees added flexibility and minimize necessary restrictions, if any, on power or HAAT. In making this proposal, however, it is not our intention to alter licensees' obligation to serve their communities of license. Accordingly, it is further proposed that such short-spaced facilities provide a minimum field strength of 3.16 mV/m (70 dBu) over the entire principal community to be served in accordance with Section 73.315 of our rules.

14. *Interference protection standards.* It is proposed that facilities that do not meet minimum spacings provide interference protection to other stations and allotments to which they are short-spaced in accordance with the prohibited signal overlap criteria outlined in the table in Appendix C. For each class of station,the table specifies the field strength values of the co-channel and adjacent channel interfering contours, which must not overlap the protected contours of adjacent and co-channel stations and allotments. In applying these criteria, protection to co-channel and adjacent channel stations and allotments would be based upon the assumption that such stations and allotments are operating with maximum permitted facilities. In the case of unused allotments, interference protection calculations would be performed assuming the use of maximum facilities for the class of allotment and a nondirectional antenna. For the station that elects to short-space, either by using a directional antenna or reduced facilities, we propose that it be so designated and will, thenceforth, be protected only to the limits of the service contour as defined by its short- spaced pattern.

15. These interference protection criteria are similar to those currently specified in Section 73.509 for noncommercial educational FM stations (NCE-FM). That section establishes the interference contours which must not overlap the 1 mV/m protection contour for NCE-FM stations. For most classes of commercial stations, *i. e.*, classes A, C, C1, and C2, the minimum separations provide interference protection to the 1 mV/m service contour. However, for Classes B and B1, the 0.5 mV/m and 0.7 mV/m contours are protected, respectively, so as to maintain service areas consistent with those derived under the Table of Allotments.[13] Although rejected in BC Docket 80-90, we are now posing the question of whether circumstances are sufficiently different at this time to warrant specification of a uniform protected contour of 1 mV/m for all classes of stations, including Classes B and B1.

16. We also wish to consider the degree to which, if any, licensees electing to be short-spaced under this proposal should be permitted to accept some interference. Section 73.509 prohibits the establishment of any NCE-FM facility whose service area would be subjected to interference from other stations. Generally speaking, the minimum separations also prevent commercial stations from experiencing interference to their service areas. Under certain combinations of facilities and station classes, however, stations otherwise meeting the separation requirements will produce interference contours that overlap others' service contours. In light of this built-in overlap that already exists for some stations, it would appear desirable to allow licensees to accept some interference, so that the maximum

benefits may be obtained. We therefore question the public interest utility of incorporating a prohibition against the acceptance of interference into the regime we propose herein.[14]

17. *Directional antenna issues.* A number of commenters suggest that a prerequisite to authorizing routine use of directional antennas for purposes of interference protection is increased accuracy in predicting their radiated patterns. Hammett and Edison, for example, an engineering consulting firm, which filed a petition for Rule Making concerning this matter[15], and others contend that the current standards are inadequate to accurately reflect the true radiation pattern of directional and non-directional antennas, particularly in accounting for the pronounced effect of antenna supporting structures. The comments suggest that accurate specification of directional antenna patterns may be of particular importance in short-spaced situations in order to control interference.

18. We tentatively propose, in accord with the Hammett and Edison petition, that radiation pattern measurements of the antenna be done in an environment that reasonably duplicates that of the antenna as mounted on its supporting structure. In accord with another of Hammett and Edison's recommendations, we further propose that applicants seeking the use of directional antennas submit only a theoretical pattern that provides the specified protection levels for other stations and the calculated coverage contours based on that pattern. Upon filing for the license, the applicant would be required, in the interests of interference protection, to include the actual pattern measurements to demonstrate that the radiation limits are not exceeded. Coverage contours would not be determined on this basis but would continue to be based on the theoretical pattern. We believe that these or similar rules would facilitate the accurate prediction of the interference potential of short-spaced stations and their actual coverage areas. Therefore, we request comment on the proposals made by Hammett and Edison, and recommendations of other antenna provisions that would ensure protection to other stations and allotments.

19. Section 73.316(b) prohibits the ratio of maximum to minimum radiation in the horizontal plane of a directional antenna from exceeding 15 dB. The desirability of continuing this proscription was addressed in the *Inquiry* and commenting parties contended that it is no longer appropriate owing to advances in the state-of-the-art. Moreover Second *Report and Order* in MM Docket 86-144, our rules for grandfathered stations had specified that the rate of change in the radiation pattern of a directional antenna should not vary more than 2 dB in any 10 degrees of azimuth.[16] This raises the issue of whether general use of directional antennas should warrant a provision in the rules limiting the rate of change of the antenna radiation pattern.

20. After assessing the comments, we have concluded that the rules are unnecessarily restrictive in prescribing a maximum-to-minimum ratio of 15 dB. However, while proposing to relax this restriction, we seek further comments as to what maximum level of radiation suppression should be permitted. Additionally, further comments are requested regarding the need for imposing any restriction on non-grandfathered stations as to the maximum rate of change in the horizontal radiation pattern, and what that rate should be.

21. While channel allotments are made on the basis of horizontal signal polarization, most stations employ vertical polarization in addition to horizontal polarization. We are concerned that the power of the vertically polarized component on occasion may be greater than the horizontal component, and could pose a greater interference potential than that predicted on the basis of considering the horizontal alone. Thus, we seek comment on whether the vertically polarized component should be protected in those directions where its power exceeds that of the horizontal component of the directional pattern, or should the vertical pattern be restricted to remain within the horizontal radiation pattern.

OTHER MATTERS

22. It is expected that the processing of applications for short spaced directional antenna systems will require implementation of automated interference analysis. To facilitate such analysis, we propose to require that applicants submit their directionalized patterns in tabulated form with values of relative field at periodic intervals of azimuth about the antenna. We solicit comments on what should be the appropriate azimuth interval, considering the cost to the applicant of having generated an adequate description of the pattern, *e. g.* 1, 5, 10 degree(s), etc. As a minimum, we are considering adoption of additional antenna pattern filing requirements similar to those required for low power television stations. (*See* subsections 74.735(c)(2)-(5)).

23. However, we are concerned that such authorizations may initially overburden our applications processing resources. Accordingly, we question whether initially we should only accept applications from certain categories of station applicants and, after a period of time, accept applications from all parties. Therefore, we seek comments as to how these categories might be established.

24. Another critical matter that must be resolved should we authorize short-spaced facilities is that of accurately reflecting the HAAT along the arc subtending the station or allotment to be protected. This is required so as to obtain as accurate an estimate of the interferening signal from the proposed short-spaced station. The HAAT used for NCE-FM stations is that of the antenna height along the radial connecting the proposed station and the existing nearby stations on relevant channels. Directional antennas are also commonly used in low power television and for that service the HAAT is determined by averaging the antenna heights along the azimuths of the arc subtending the maximum service contour of the station to be protected and at every 10 degrees between the two edges of that arc. Another method used internationally is the simple averaging of the antenna heights at two radials at either end of the arc. We propose to adopt one of these three methods or any other method that is workable, and most accurately portrays the antenna height along the arc that subtends the station(s) to be protected. Comments are invited.

25. Regarding the use of directional antennas to accommodate short- spacing of stations whose channel frequencies differ by 10.6 or 10.8 MHz, (which approximates the intermediate frequency (IF) for FM receivers), we will defer consideration of this topic at this time. This does not appear to be a significant issue at this time. Not only are there relatively few pairs of stations (less than 50), but there is also an outstanding proposal regarding adjustment

of IF spacings.[17] Any proposal concerning short-spaced IF-related stations, if any, will occur subsequent to a decision in that IF proceeding.

CONCLUSION

26. In this proceeding, we have proposed procedures to permit routine authorization of non-interfering short-spaced FM station assignments. We encourage all interested parties to comment not only on the issues specifically discussed in this *Notice*, but also on any other related technical issues that are within the scope of this proceeding.

AUTHORITY

27. Authority for this proposed rule making is contained in Sections 1.3. 4(i) and (j), 303 308, 309 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **May 27, 1988** and reply comments on or before **June 27, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted.

28. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases a final order; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1. 1203.

29. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide, on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or 'arguments not already reflected in that person's previously filed written comments, must provide, on the day of the oral presentation, a memorandum to the Secretary (with a copy to the commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

30. As required by Section 603 of the Regulatory Flexibility Act, the FCC had prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this Notice, including the initial regulatory flexibility analysis to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(c) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 5 U.S.C. Section 601 et seq. (1982).

31. The proposals contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

32. To file formally in this proceeding, participants must file an original five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

33. For further information on this proceeding, contact Bernard Gorden, Mass Media Bureau. (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

I. Reason for action

The reason for this action is to propose FCC rule provisions for short-spaced commercial FM station assignments.

II. The objective

The objective is to allow all commercial FM stations more flexibility in selecting the most optimum antenna site to provide broadcast service to it listening public.

III. Legal basis

The legal basis for the Commission's engaging in rule making is contained in Sections 4(i) and (j) and 303(r) of the Communications Act of 1934, as amended.

IV. Description, potential impact, and number of small entities affected

There are approximately 4000 commercial FM stations licensees and 1300 FM non-commercial station licensees in the United States. While most of these licensees will probably not be inclined to modify their facilities, many future licensees may give strong consideration to using less than maximum facilities or the use of directional antennas to avail themselves of the flexibility of selecting a more favorable transmitter site, that is short-spaced. We expect no negative impact to these stations, small entities or large, as we are not mandating any new requirements. Interference should not increase as a result.

V. Recording, Recordkeeping, and Other Complicance Requirements

There is no additional impact.

VI. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rules

There is no overlap, duplication, or conflict.

VII. Any Significant Alternatives Minimizing Impact On Small Entities and Consistent with Stated Objective

There are no alternatives available.

APPENDIX B

Comments addressing this proceeding were submitted by the following parties:

1. Arthur K. Peters, P.E. consulting engineer
2. Association for Broadcast Engineering Standards, Inc.
3. Association of Federal Communications Consulting Engineers
4. The Association of Maximum Service Telecasters
5. Beasley Radio Company
6. CBS, Inc.
7. Clear Channel Communications, Inc.
8. Cohen and Dippell, P.C.
9. Doug C. McDonell
10. Faulkner-Phillips Media, Inc.
11. Group M Communications
12. Hatfield & Dawson, Consulting Engineers
13. The Hearst Corporation
14. Interstate Broadcasting Systems, Inc.
15. Inter Urban Broadcasting Systems, Inc.
16. Jampro Antennas, Inc.
17. Joliet Broadcasting Company
18. Lamar County Broadcasters, Inc.
19. La Salle County Broadcast, Inc.
20. Malrite Radio and Television, Inc.
21. Massachusetts Class A Broadcasters Association
22. Mid-Ohio Communications, Inc.
23. National Association of Broadcasters
24. National Public Radio
25. Paradise Broadcasting, Inc
26. Peter K. Onnigian, Antenna Engineering Consultant
27. SBE Senior Broadcast Engineer
28. Serge Bergen, PE, Consulting Engineer
29. SIS Sound, Inc.
30. Superior Broadcasting, Inc.
31. Redwood Empire Stereocasters
32. Vacationland Broadcasting Services

SUMMARY OF COMMENTS

1. Thirty four comments and one reply comment were filed in response to the *Inquiry*. Twenty-nine of the comments generally favored our proposal to permit limited use of directional FM antennas to protect the service contours of FM stations in cases where meeting the current mileage separation criteria was unduly burdensome. Many of these commenters were Class A FM station licensees that submitted engineering statements showing how the proposed rules would permit them to upgrade their facilities (sometimes to a higher license class) without causing additional interference to other stations. Five commenters opposed the proposal, indicating their belief that it was merely the first step in the evolution of a "demand type" allotment system in which stations would eventually be "shoehorned in" to the detriment of current licensees.[18]

2. Those favoring the proposal stressed the improvement in service they believed would be possible as a result of the improved flexibility that would be provided in FM station siting. The majority of these commenters discussed at length the various engineering considerations relevant to expanded use of directional FM antennas.[19] These included the cochannel and adjacent channel protection criteria to be used in cases where the mileage separation criteria cannot be met, the method for computing signal strengths, and directional FM antenna characteristics and installation.

3. For example, those supporting our proposal favored our adopting the contour protectia criteria applicable to non-commercial, educational FM station for commercial station use that was suggested in paragraph 10 of the *Inquiry*. There was also general support for the proposition that the interference protection to be afforded by short-spaced stations should extend to the maximum possible facilities of potentially affected cochannel and adjacent channel stations.[20] Lamar County Broadcasters, Inc. (Lamar) dissented however, arguing that only actual facilities should be protected. It noted that because of the expense involved, it is doubtful that Class C or C1 stations would upgrade in the future. Thus, Lamar suggests that licensees be given a time limit in which they must upgrade, after which only their actual facilities would be protected.

4. Some sentiment was also expressed in favor of our adopting a uniform signal strength contour that would be protected.[21] However, La Salle County Broadcasting, Inc. (La Salle) noted that because the various sub-categories of FM service are so inconsistent, developing a single standard would be difficult. La Salle also remarked that its use likely would be opposed by those who would be adversely affected (i.e., Class B and Class B1 station licensees). Thus, while the use of a uniform signal strength countour

(1 mV/m was the figure invariably suggested) was deemed desirable, recommendations toward achieving this result were inconclusive.

5. On the matter of protection to be afforded short-spaced stations, there was widespread agreement that only current facilities need be protected, since it was presumed that the use of greater facilities on the part of short-spaced stations would be precluded by interference considerations.[22]

6. Several consulting engineers filed comments pertaining to FM directional antenna performance and installation. There appeared to be agreement that if standardized directional antenna patterns were accepted as a part of the application process, they should be subsequently confirmed by measurements performed on an approved antenna range, preferably using the actual antenna and the same antenna tower type to be installed at the applicant's facility. However, this was not considered mandatory, and most of the engineers filing comments supported the use of "scaling" for determining antenna performance if it was done accurately.[23]

7. On the matter of FM directional antenna characteristics. Onnigian favored retaining the 15 dB limit between the maximum and minimum signal radiated in any given direction[24] and the 2 dB per 10 degree limit on the rate of change of pattern suppression versus azimuth.[25] However, Arthur K. Peters (Peters) believed these limits were too restrictive and should be eliminated. The AFCCE suggested the variant of retaining the 15 dB limit for cases such as short-spacing that involve a specific amount of interference protection. But if interference protection is not an issue, greater deviation would be permitted. The AFCCE supports Peters in favoring elimination of the 2 dB/10 degree limit on the rate of change. The comments were inconclusive on the number of radials required to define the antenna pattern. However, since there was agreement that the entire service areas of cochannel and adjacent channel stations should be protected, there was implicit agreement that the resolution should be adequate for that purpose.

8. There were also differences of opinion as to how propagation and height-above-average-terrain (HAAT) calculations should be performed. The AFCCE favored use of the Commission's "F(50,50)" and "F(50,10)" propagation curves, since their use over many years has revealed no significant flaws. However, the AFCCE noted (as did others) that various computer programs implementing these curves occasionally yielded significantly different results.[26] It recommended that the Commission issue a detailed table of field strength versus distance versus antenna height, and require that all other programs yield its results within a certain percentage of accuracy. Most of the engineers favored using additional radials to make HAAT calculations in the direction of a short-spaced station. With the availability of digitized terrain databases and computers, the extra calculations were not considered burdensome. National Public Radio, however, disputed this view, arguing that those resources were often beyond the means of its member stations.

9. Another technical issue raised was whether or not the Commission should protect the vertically polarized signals of FM stations.[27] Several commenters remarked that the vertical signals were increasingly important as a means of delivering good signals to automobile receivers. Thus, CBS, Inc. (CBS), Alan Roycroft and others argued that the vertical component should also be protected.

10. Lastly, there were some differences of opinion over what circumstances warranted the use of directional antennas. The Association for Broadcast and Engineering Standards "ABES") argued that the current allotment table should be considered the primary means of making FM assignments, and that directional FM antennas should be an option only for those with no other alternative.[28] CBS likewise favored directional antennas principally as a means of resolving short-spacing problems, not as an allocation tool. But the majority of those supporting the proposal favored its more general use. Lamar argued that the great demand for existing and new FM stations cries out against any regulatory provision that hinders efficient use of the spectrum. Mid-Ohio Communications and the Massachusetts Class A Broadcasters Association urged that directional FM antennas be permitted to provide coverage to currently unserved areas in addition to serving as a means of resolving short- spacing problems.

APPENDIX C

TABLE

Prohibited Overlap

Frequency Separation	Contour of Proposed Station	Contours of other Stations: Classes A, C, C1, and C2	Class B	Class B1
Co-channel	0.1 mV/m (40 dBu)	1 mV/m (60 dBu)		
	0.05 mV/m (34 dBu)		0.5 mV/m (54 dBu)	
	0.07 mV/m (37 dBu)			0.7 mV/m (57 dBu)
200 kHz	0.5 mV/m (54 dBu)	1 mV/m 60 (dBu)		
	0.25 mV/m (48 dBu)		0.5 mV/m (54 dBu)	
	0.35 mV/m (51 dBu)			0.7 mV/m (57 dBu)
400 kHz	10 mV/m (80 dBu)	1 mV/m (60 dBu)		
	5 mV/m (74 dBu)		0.5 mV/m (54 dBu)	
	7 mV/m (77 dBu)			0.7 mV/m (57 dBu)
600 kHz	100 mV/m (100 dBu)	1 mV/m (60 dBu)		
	50 mV/m (94 dBu)		0.5 mV/m (54 dBu)	
	70 mV/m (97 dBu)			0.7 mV/m (57 dBu)

FOOTNOTES

[1] A short-spaced FM station has its transmitting antenna site located at less than the required distance from the transmitting antenna site of an adjacent or co-channel station or stations or reference point of vacant channel allotments.

[2] *See Notice of Inquiry* in MM Docket No. 87-121, 52 FR 20430 (June 1, 1987).

[3] Additional considerations apply to FM channel 200 related to Class D educational stations. Also, § 73.507 states that non-commercial stations that are on channels adjacent to commercial stations on channels 221, 222, and 223 must meet minimum distance separations to those stations as specified for commercial channels.

[4] Administratively, objectionable interference is defined to exist within any geographic areas where prohibited overlap occurs between the contours prescribed in § 73.509 of the FCC rules.

[5] § 73.207 contains tables prescribing co-channel and adjacent channel minimum distance separation requirements between the various classes of stations and allotments.

[6] The field strengths of the protected contours for commercial stations and allotments vary depending on the class of station or allotment.

[7] Currently, grandfathered short-spaced commercial FM stations are allowed routinely to use directional antennas to avoid causing harmful interference. Properly spaced stations are allowed to use directional antennas to avoid wasting energy over underpopulated or unpopulated areas such as deserts and lakes. They may also use them to reduce the intensity of reflected signals. Although it has been generally preferable to choose a site where a non-directional antenna may be used, the Commission has recognized that topography, shape of the desired service area, or population distribution may make the choice of a transmitter antenna location difficult. In such cases, per § 73.315(c), directional antenna systems may be used.

[8] *See* Appendix B for a list of parties filing comments and reply comments, as well as a brief comment summary.

[9] While some commenting parties express concern as to how such provisions may impact the long-established Table of Allotments in § 73.202, we are not proposing in this *Notice* to permit short-spaced allotments, nor do we envision any alteration in the allotment process or the Table of Allotments.

[10] "Grandfathered" FM stations, *i. e.*, those stations that were short- spaced at the inception of the Table of Allotments in 1964, are permitted to remain short-spaced in accordance with § 73.213. § 73.209(c) also permits short-spaced stations at "antenna farms" designated pursuant to specified FCC procedures. (To date, however, no "antenna farms" have been designated.)

[11] The current FM Working Arrangement between the United States and Canada makes provision for coordinating proposed short-spaced sites. Use of FM directional antennas for the purpose of providing requisite interference protection to stations and allotments in the other country is also provided for. Negotiations are currently underway with Mexico to develop a new FM Agreement that incorporates similar provisions proposed by the United States.

[12] *See* 47 CFR § 73.211.

[13] *See Report & Order* in BC Docket 80-90, at paras. 59-62 and 87, 48 FR 29486, June 27, 1983; *recon on other grounds*, 49 FR 10260, March 1, 1983, in which 1 mV/m for all classes was considered but rejected because of the projected undersirable reduction of the primary service area for Class B stations. As a result, the Commission adopted a service contour for the new Class B1 stations similar to that for Class B stations.

[14] In other contexts we have raised the issue of whether the licensee may decide to receive interference. *AM Technical Criteria* in MM Docket No. 87-267, FCC 87-245, 52 FR 31795, para. 46-58 (August 24, 1987).

[15] RM-6015, *Public Notice*, Report No. 1669, released July 23, 1987.

[16] Despite the amendment to § 73.213, eliminating this requirement, it has been a longstanding Commission policy and remains a current practice to specify on construction permits of grandfathered short-spaced stations using directional antennas that the increase in radiation off the line between the stations shall not exceed 2 dB per 10 degrees of azimuth.

[17] *See Further Notice of Proposed Rule Making* in MM Docket No. 86-144, FCC No. 88-87, adopted March 1, 1988. As we indicated in that proceeding, we shall not consider alleged discrepancies between the separation distances in the rules and contour overlap calculations presumed to underlie them as sufficient grounds for a waiver of § 73.207.

[18] In the FM broadcast service, station assignments are made on the basis of a pre-determined allotment table designed to provide various grades of FM service to different geographical areas of the country. This contrasts with the "demand" nature of the AM service, where application for a station may be made anywhere provided its signal would meet the interference protection criteria applicable to stations already in operation. The maximum possible quantity of stations is higher in the latter case.

[19] As the Association of Federal Communications Consulting Engineers (AFCCE) mentions in its comments, the use of directional FM antennas is not new. Currently, they are employed by about 530 stations (many of these non- commercial, educational FM stations) for interference protection and service area optimization purposes.

[20] For various reasons, not all FM stations use the maximum possible power or antenna height for their particular class of station. However, if interference protection is based on the maximum possible facilities, sub- maximum stations may be free to upgrade at some time in the future.

[21] Currently, the service areas of Class A and Class C FM stations are considered to extend to their 1 mV/m contours. However, in the case of Class B and Class B1 FM stations, the service areas are considered to extend to their 0.5 and 0.7 mV/m contours, respectively.

[22] *See* , for example, the comments of Peter K. Onnigian and William V. Tranavitch, Jr., and the AFCCE.

[23] "Scaling" is a technique in which measurements are performed with the antenna, mounting structure and operating frequency proportionally reduced in frequency. It is presumably more convenient and less expensive than making actual measurements.

[24] *See* 47 CFR § 73.316(b).

[25] *See* 47 CFR § 73.213(c).

[26] However, Malrite Radio and TV, Inc. (Malrite) contradicted the AFCCE view, indicating that the FCC's propagation curves needed improvement, particularly where the antenna height exceeded 2000 feet, and argued that the curves needed to incorporate a realistic correction for terrain roughness.

[27] In the case of commercial FM stations we have traditionally considered only the horizontal signal component (the horizontal component tends to propagate better than the vertical component and the latter is expected to not exceed the former in terms of radiated power) for purposes of interference determination. This is not the case with the respect to noncommercial, educational

stations, however, which often radiate increased power in the vertical plane to reduce interference to television stations that operate on channel 6.

[28] As an example, use of a directional FM antenna would be appropriate where an applicant was unable to obtaining a zoning permit for any other site, or for other similar reasons beyond the applicant's control.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: *Notice of Proposed Rule Making* to permit short-spaced FM transmitter sites.

I generally support the notion that a more flexible approach to the problem of short-spaced antenna sites may be beneficial to the public as well as some FM broadcasters. The additional flexibility given to FM licensees in site selection will, in some cases, allow them to provide service to areas that may not receive adequate service because of our short-spacing rules. There are many broadcasters that, for legitimate reasons, are unable to meet the minimum distance requirements.

The *Notice of Proposed Rule Making* adopted by the Commission correctly observes that our short-spaced rules are enforced strictly. As a proposed solution, the Commission suggests that we adopt procedures that would permit routine authorization of short-spaced FM assignments. I would have preferred a more modest proposal that employed case-by-case approach. In this regard, applications involving short-spaced sites or directional antennas would be treated as waivers to our existing rules.

I beleive we should move cautiously. As several of the comments point out, problems with interference have not been completely resolved. Given these concerns, I beleive a case-by-case approach is preferable to the routine authorization of short-spaced transmitter sites. Such an approach would provide the necessary flexibility without endangering the integrity of our table of allocations. Moreover, while the *Notice* does not propose to consider directional antennas and short-spaced facilities at the allotment stage, I am concerned that the ourtine use of these techniques is merely the first step in the elimination of the table of allocations.

Therefore, I concur with issuing this *Notice of Proposed Rule Making*. I would welcome any comments addressing the concerns I have raised.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Chris Craig Hudgins — FOIA Control No. 87-190

On Request for Inspection of Records

ORDER

Adopted: March 14, 1988; Released: March 30, 1988

1. The Commission has before it for consideration an Application for Review filed by Chris Craig Hudgins in the above- captioned matter.

2. Pursuant to his initial request for production of documents under the Freedom of Information Act, 5 U.S.C. § 552, Mr. Hudgins was supplied with a copy of a letter of complaint. However, portions of that letter were withheld to protect the identity of the Commission's confidential source. Mr. Hudgins now seeks access to the withheld material or any segregable portions that were improperly withheld.

3. The Freedom of Information Act specifically exempts from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . disclose the identity of a confidential source . . . ." 5 U.S.C. § 552(b)(7). In this case, the complainant specifically requested confidentiality. Thus, portions of the complaint letter that identified the complainant or from which the identity of the complainant could reasonably be determined were properly withheld. *See Sands v. Murphy*, 633 F.2d 968 (1st Cir. 1980).

4. Mr. Hudgins also requests an index of any material that was withheld. However, all documents within the scope of the FOIA request were supplied to Mr. Hudgins. The Commission is not required to supply an index describing the portions of the letter properly withheld under Exemption 7. Nor are we required to further describe the document, where such a description could reveal the identity of a confidential source. *See e. g., Curran v. Department of Justice*, 813 F.2d 473, 475 (1st Cir. 1987).

5. Accordingly, IT IS ORDERED, That the Application for Review filed by Chris Craig Hudgins IS DENIED.

6. The requester may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello, Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TPI TRANSMISSION SERVICES, INC.,

Complainant,

v. File No. E-88-39

PUERTO RICO TELEPHONE COMPANY, and
PUERTO RICO
COMMUNICATIONS AUTHORITY,

Defendants.

ORDER

Adopted March 22, 1988; Released: March 30, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. Before the Bureau is a motion by TPI Transmission Services, Inc. (TPI), filed on February 10, 1988, seeking dismissal of one of three counts of the complaint TPI filed in this matter. In support thereof, TPI states that no controversy exists with respect to Count Two of its complaint because of a payment received from defendant, Puerto Rico Telephone Company (PRTC) after the complaint had been filed. TPI also filed a motion on March 15, 1988, requesting that its complaint otherwise be dismissed insofar as it is directed against the Puerto Rico Communications Authority (PRCA). TPI states that PRCA's situation is sufficiently different than PRTC is and that the public interest would best be served at this juncture by dismissal of PRCA as a defendant. Both requests are unopposed and, good cause appearing, the motions are granted.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that Count Two of the complaint filed by TRT on December 15, 1987, IS DISMISSED.

3. IT IS FURTHER ORDERED that the complaint OTHERWISE IS DISMISSED without prejudice insofar as it is directed against PRCA.

4. IT IS FURTHER ORDERED that the Motion to Dismiss filed by PRCA on February 17, 1988, IS GRANTED.

FEDEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 30, 1988

U S WEST, PACIFIC BELL, NEVADA BELL FILE REVISIONS TO COST ALLOCATION MANUALS; PUBLIC COMMENT INVITED

On March 21, 1988, U S West, Pacific Bell and Nevada Bell filed revisions to their Part 64 cost allocation manuals for the separation of regulated and nonregulated costs. The original manuals were filed in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987). The Common Carrier Bureau approved the manuals on December 28, 1987, conditional upon the filing of numerous specified revisions. *See U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195 (1988); Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulat ed Costs,* 3 FCC Rcd 287 (1988).

Comments on the revisions to the U S West, Pacific Bell, and Nevada Bell manuals may be filed (in separate pleadings) no later than April 29, 1988. Replies should be filed by May 16, 1988. Comments should reference the following file numbers:

U S West AAD 7-1693
Pacific and Nevada AAD 7-1692

Copies of the cost manual revisions may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in Room 812, 2000 L St., N.W., Washington, D.C. 20554.

For further information contact Jane Jackson at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Simmons Communications
of Delaware-Maryland,

Complainant, File No. PA-85-007

v.

Delmarva Power & Light Company,

Defendant.

ORDER

Adopted March 22, 1988 **Released: March 30, 1988**

By the Chief, Enforcement Division, Common Carrier Bureau.

1. On April 5, 1985, Simmons Communications of Delaware-Maryland (Simmons) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224. On February 26, 1988, Simmons submitted a letter requesting dismissal of the complaint. On the basis of the statement contained in the complainant's letter, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Simmons Communications of Delaware-Maryland is DISMISSED and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Service Co., Inc.,

Complainant,

v. File No. PA-85-012

Public Service Company
of New Hampshire,

Defendant.

ORDER

Adopted March 22, 1988 **Released March 30, 1988**

By the Chief, Enforcement Division, Common Carrier Bureau.

1. On July 18, 1985, Cablevision Service Co., Inc. (Cablevision) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224. On February 26, 1988, Cablevision submitted a letter requesting dismissal of the complaint. On the basis of the statement contained in the complainant's letter, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Cablevision Service Co., Inc. is DISMISSED and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Missouri Cable Television Association,

Complainant,

v. File No. PA-85-015

Union Electric Company,

Defendant.

ORDER

Adopted March 22, 1988 **Released: March 30, 1988**

By the Chief, Enforcement Division, Common Carrier Bureau.

1. On August 7, 1985, Missouri Cable Television Association (MCTA) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224. On January 4, 1988, MCTA submitted a letter requesting dismissal of the complaint. On the basis of the statement contained in the complainant's letter, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Missouri Cable Television Association is DISMISSED and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cencom of Missouri,

Complainant,

v. File No. PA-85-017

Union Electric Company,

Defendant.

ORDER

Adopted March 22, 1988 Released: March 30, 1988

By the Chief, Enforcement Division, Common Carrier Bureau.

1. On August 14, 1985, Cencom of Missouri (Cencom) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224. On January 4, 1988, Cencom submitted a letter requesting dismissal of the complaint. On the basis of the statement contained in the complainant's letter, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Cencom of Missouri is DISMISSED and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Continental Cablevision of
St. Louis County, Inc.,

Complainant,

v. File No. PA-85-018

Union Electric Company,

Defendant.

ORDER

Adopted March 22, 1988 **Released: March 30, 1988**

By the Chief, Enforcement Division, Common Carrier Bureau.

1. On August 22, 1985, Continental Cablevision of St. Louis County, Inc. (Continental) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224. On January 4, 1988, Continental submitted a letter requesting dismissal of the complaint. On the basis of the statement contained in the complainant's letter, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Continental Cablevision of St. Louis, Inc. is DISMISSED and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Continental Cablevision of
Virginia, Inc.,

Complainant,

v. File No. PA-83-037

Virginia Electric and Power Company,

Defendant.

ORDER

Adopted March 22, 1988 **Released March 30, 1988**

By the Chief, Enforcement Division, Common Carrier Bureau.

1. On September 16, 1983, Continental Cablevision of Virginia, Inc. (Continental) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224. On December 17, 1987, Continental submitted a letter requesting dismissal of the complaint. On the basis of the statement contained in the complainant's letter, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Continental Cablevision of Virginia, Inc. is DISMISSED and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Continental Cablevision of
Virginia, Inc.,

Complainant,

v. File No. PA-85-008

Virginia Electric and Power Company,

Defendant.

ORDER

Adopted:March 22, 1988 Released: March 30, 1988

By the Chief, Enforcement Division, Common Carrier Bureau.

1. On May 10, 1985, Continental Cablevision of Virginia, Inc. (Continental) filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224. On December 17, 1987, Continental submitted a letter requesting dismissal of the complaint. On the basis of the statement contained in the complainant's letter, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Continental Cablevision of Virginia, Inc. is DISMISSED and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-404

In The Matter of

Amendment of Part 90,
Subparts M and S, of the
Commission's Rules

REPORT AND ORDER

Adopted: February 25, 1988; Released: March 30, 1988

By the Commission: Commissioner Quello concurring and issuing a statement.

I. INTRODUCTION

1. In this *Report and Order*, the Commission establishes a comprehensive regulatory framework for the nation's Specialized Mobile Radio (SMR) Service. This framework provides the SMR industry with the technical and operational flexibility it will need to meet the challenge of providing innovative land mobile communications services to American business, government, and individuals into the twenty-first century.

2. This proceeding was initiated to propose greater flexibility and enhanced service options for SMR licensees and end users. The SMR industry emerged as a key provider of private land mobile communications service in 1978. Certain trends in the industry since that time, and our own experience with regulating SMR systems, indicated that a comprehensive review of the policies governing these systems was warranted. In November 1986, we released a *Notice of Proposed Rule Making* in this proceeding proposing, among other things, modifications to SMR loading standards, standardization of processing and assignment procedures, relaxation of the prohibition against partial assignments of authorizations, and a modification of our eligibility requirements for SMR end users (customers of the SMR operators) to make this service available to a wider segment of the American public.[1]

A. *Scope of the SMR Service*

3. The SMR service has emerged over the past decade to become the preeminent provider of private land mobile communications service, particularly in the nation's largest metropolitan areas. According to the Commission's records, there are approximately 3,000 trunked SMR operators in the United States with some 670,000 mobile transmitters operating on them.

4. The demand for, and growth of, SMR facilities has been strong, especially in major cities. By 1981, two years after equipment inventories became widely available, trunked SMR frequencies were exhausted in New York, Los Angeles and Chicago. In 1982, additional frequencies were made available for SMR operations. Applications for these frequencies in the nation's larger markets far outnumbered the number of channels available and lotteries were held to assign these frequencies during 1983-84. The period 1984-86 demonstrated strong growth in the demand for SMR facilities. When additional frequencies were made available in the 900 MHz band to establish twenty new trunked SMR systems in each of the nation's fifty largest urban areas, the Commission received more than 60,000 applications. In 1987 lotteries were held in all 50 markets.

B. *History of 800 MHz Private Land Mobile Service*

5. In 1970, the Commission reallocated 115 MHz of spectrum in the 806-947 MHz band[2] for both private and public land mobile use. [3] The private land mobile services received 30 MHz (600 channel pairs) of this allocation and the newly created cellular radio service received 40 MHz.[4] Due to the varied nature of the private radio services and users, our regulatory approach to these services was designed to promote spectrum efficiency while accommodating the diverse mobile communications operations of over twenty distinct private radio services.

6. The balancing of these objectives led us to implement a regulatory structure that differed markedly from the traditional private land mobile rules. We initially released 200 channels for use in the trunked mode of operation and 100 channels for use in the traditional single channel conventional mode. All 300 channels were available for use by any Part 90 eligible.

7. These 300 channels, which were governed by a newly created Subpart M, were assigned on a first-come, first-served basis. Applications that could not be granted because channels were not available were placed on a waiting list until channels became available. Under Subpart M, licensees of trunked systems must meet a 70 mobile units per channel loading requirement within five years of grant.

8. The remaining 300 private land mobile channels were placed in reserve so that we could use our experience with the initial set of 300 channels to determine the optimum means to release them. By 1978, however, there were shortages of conventional channels in the major metropolitan areas. We therefore released an additional 50 channels for conventional use.[5] By late 1979 long waiting lists began to form for trunked channels in the major metropolitan areas. To alleviate this spectrum shortage, we released the remaining 250 private land mobile channels in July 1982. In doing so, we created a new Subpart S to govern these new channels as well as the conventional channels previously governed by Subpart M.[6]

9. Unlike our previous allocation governed by Subpart M, these new channels were not divided according to system technology. Rather, they were grouped into four specific service categories: Specialized Mobile Radio (80 channels), Industrial/Land Transportation (50 channels), Business (50 channels), and Public Safety/Special Emergency (70 channels). Applicants in each of these categories could choose trunked or conventional technology. Under Subpart S, licensees of trunked systems must meet three and five year loading requirements of 60 and 80 mobile units per channel, respectively. Applications for Subpart S channels that cannot be granted because channels are unavailable in the requested geographic area are dismissed and returned to the applicant. Thus, at the conclusion of the proceeding releasing the 250 channels, we had two separate rule subparts governing trunked private land mobile radio systems at 800 MHz with different loading standards and different application processing procedures.

10. To provide a smooth transition for trunked licensees governed by Subpart M to the new rules in Subpart S, we allowed licensees to operate under the old (Subpart M) rules for five years.[7] At the end of that period, on September 1, 1987, all 800 MHz systems were to be subject to Subpart S.[8] In 1986, when we released 399 channels in the 900 MHz land mobile reserve proceeding for private land mobile operations, we assigned 200 channels to the SMR category, 100 channels to the Business Radio category, and 99 channels to the Industrial/Land Transportation category. These channels, too, were to be governed by Subpart S.

C. *Development of the SMR Service*

11. Increasing congestion of private land mobile spectrum and the resulting demand for more channels resulted in our decision, in the Docket No. 18262 proceeding, to adopt a plan to promote the larger and more effective use of the 800 MHz spectrum. That plan had two features. First, we made a sizable allotment to multichannel trunked systems, which were more efficient than any previous private radio technology. Second, we allowed licensees to provide radio service to Part 90 eligibles on a commercial basis to encourage them to take the risks involved in using this more complex and costly technology. We called this new service the Specialized Mobile Radio service.

12. In creating the SMR service, we intended to encourage a competitive private land mobile radio market, as well as to promote new system designs, technology, and marketing techniques to develop the new spectrum to the maximum extent.

13. This plan to promote use of the spectrum by encouraging the entrepreneurial offering of private land mobile service has been immensely successful. Of the four 800 MHz service categories, the SMR category has shown the highest activity. It has also shown a great degree of operational and technical sophistication. Though we have given SMR systems the greatest share of newly released spectrum with each allocation, each time the amount allocated has not been enough to meet the demand for SMR facilities, particularly in large urban markets.

II. ISSUE ANALYSIS

14. We will discuss the issues raised in this proceeding in six sections below: SMR end user eligibility; transfer of Subpart M trunked channels to the SMR pool; processing and assignment procedures; loading; partial assignments; and technical standards.

A. *SMR End User Eligibility*

Background

15. Currently, SMR licensees may serve only those end users who would individually qualify for licensing under Part 90 of the Rules. Generally, this includes businesses, emergency organizations, land transportation entities, and state and local government agencies, but excludes federal government agencies, individuals and representatives of foreign governments.

16. The various eligibility categories developed over time in response to needs that were identified by different groups of radio communications users. Each group identified unique communications needs necessary to promote efficiency of operations, or in some cases even to permit operations at all. The various groups contended that the needs were so specialized that specific frequencies should be set aside for each particular group. The Commission responded by creating several radio services composed of user groups of like entities, for example, the Public Safety Radio Service included local governments, police and fire departments, and related users. Regardless of the type of entity, the radio communications facilities authorized under the Rules were intended primarily to serve the individual needs of the licensee. Cooperative agreements for sharing of facilities were permitted but only on a nonprofit basis.

17. The SMR service created in 1974 was a new type of service which allowed an entrepreneurial licensee to provide for the communications needs of plumbers, carpenters, doctors, taxicabs, oil riggers, or any other type of commercial or non-federal governmental entity for a profit. Since this was just a more complex and efficient way to deliver dispatch services to the traditional land mobile radio users, the Commission limited the eligible end users to those who could themselves qualify for licensing under Part 90 of the Rules. Experience, however, has shown that SMR operators have become expert at maximizing spectrum utilization and serving more users more efficently, due in large part to the nature of trunked operations.

Proposal

18. In the *Notice*, we proposed to expand the eligibility of SMR end users to include individuals and federal government agencies. The proposal raised several issues. The first issue was whether such an expansion could alter the legal status of SMRs as private carriers. Second, we also recognized that growth in the SMR service exceeded our projections, and there are severe spectrum shortages in most major urban areas. Our proposal could increase the number of potential SMR users in these markets, thereby making it more difficult for traditional SMR end users to obtain service. Alternatively, such increased demand could be beneficial, especially in encouraging growth of SMRs in rural areas. Similarly, we also realized that traditional private land mobile users may not want to share channels with individual users and the federal government. Comments were invited on each issue.

Comments / Discussion

19. *Legal Status*. With regard to the legal issues surrounding expanding eligibility, in the *Notice* we pointed out that in the Communications Amendments Act of 1982, Congress altered the test of common carriage in mobile radio. For private mobile radio services, defined in Section 3(gg) of the Communications Act as "mobile services which provide a regularly interacting group of . . . stations . . . licensed on an individual, cooperative, or multiple basis . . . for private one-way or two-way land mobile radio communications by eligible users . . .," the test became whether the service offering was interconnected with the public switched telephone network and, if so, whether the service provided was reselling telephone exchange or interexchange service. 47 U.S.C. §§ 153(gg) and 332(c). *See* H.R. Rep. No. 765, 97th Cong. 2d Sess. *See also*, *Telocator Network of America v. FCC*, 761 F.2d 763 (D.C. Cir. 1985). Those who resell telephone exchange or interexchange service to land mobile users are classified as common carriers. Those who do not resell telephone exchange or interexchange service are classified as private carriers in this context. 1 FCC Rcd at 818.

20. Further, we indicated that while Congress incorporated the concept of eligibility in the Communications Amendments Act of 1982, there is a question as to what significance it attached to the existing definition of "eligible users." Congress noted our continuing right "to add, modify or delete private land mobile services as the need arises, consistent with the guidelines specified in subsection 331(a)."[9] Congress' use of the term "private land mobile radio services" in this context may be synonymous with private land mobile radio eligibles because historically and practically the two concepts have been synonymous, i.e., special emergency users are eligible to use the special emergency service, and so forth. Therefore, modifying the SMR service to add individual and federal government users in the SMR pools is an option that would be consistent with Congress' directive in § 331(a)(3) that the Commission encourage provision of services to the "largest feasible number of users." 47 U.S.C. § 332(a)(3).

21. On the other hand, it may be argued that Congress expected some significant eligibility restrictions to remain basic to the private radio services. Only very limited restrictions on SMR end users would remain if we were to adopt this proposal, *i. e.*, foreign governments would still be barred from eligibility. Thus, the pool of users eligible to be served by SMRs would be nearly identical to the pool of customers served by common carriers. We requested specific comments on how the proposed eligibility changes might affect an SMR's status as a private carrier.

22. Only a few of the entities commenting on the issue of expanded eligibility addressed this legal issue. NTIA agrees that the Commission has discretion to expand the class of eligible users of SMR services to include the federal government and individuals. NTIA points out that the Communications Amendments Act of 1982 refers to "eligible users" in its definition of "private land mobile service,"[10] but that it does not define or limit eligible users and that Congress clearly did not intend to limit the Commission's authority in this area.[11] NTIA agrees with our analysis that the legislative history of the Communications Amendments Act shows that Congress expected us to add, modify, or delete services and to expand the class of eligible users consistent with the public interest. Furthermore, NTIA supports our view that the test for private carriage in Section 331 of the Act is whether the service provider is reselling telephone exchange or interexchange service.[12] Expanding eligibility does not affect the legal status of SMR systems under Section 331 since SMR licensees do not resell telephone service. Moreover, the term "eligible users" contained in the Act's definition of Private Land Mobile Radio Services, 47 U.S.C. § 153(gg), is not intended to preclude expansion of SMR user eligibility.[13] In its Reply Comments, Autotel points out that SMRs are already authorized to serve state and local governments and that inclusion of the federal government as an authorized user of SMR facilities should not change the status of SMRs from private to common carriers.[14] Autotel further argues that although the Act speaks of eligible users it does not state that any specific individuals or entities may not qualify as eligible: that determination was left within our discretion. Furthermore, Autotel continues, expanding eligibility is consistent with the meaning of the Act.[15]

23. The opposing commenters contend that expanding eligibility will blur the distinction between private and common carriers.[16] To avoid common carrier regulation, they are willing to forego possible benefits from expansion of eligibility. Motorola states that the private, unregulated status of SMRs has been key to their success. Motorola argues that the legislative history of Section 331(c)(1) of the Communications Act shows Congressional intent to codify existing practices and set guidelines as to eligibility and that this proposal departs substantially from historical practice.[17] NABER argues that Congress, in enacting Section 331(c) of the Communications Act, did not intend for the Commission to permit end users other than Part 90 eligibles to use SMR facilities.[18] SIRSA and UTC contend that the term eligibility used in the Act cannot be read to extend to any categories of users that would not be included in the current definition of eligibility under Part 90.[19]

Decision

24. We have carefully examined the comments and conclude that the legal status of SMRs is not affected by an expansion of the pool of eligible SMR users. Congress departed from the traditional concept of common carriage when it enacted Section 331(c)(1) of the Communications Act, 47 U.S.C. § 332(c)(1), in 1982 to provide clear demarcation between private and common carrier land mobile services. In enacting this legislation, Congress directed the Commission to "add, modify, or delete private land mobile services as the need arises, consistent with the guidelines specified in subsection 331(a)."[20] In pertinent part, Section 331(c)(1) provides that a private land mobile radio service includes "service provided by specialized mobile radio . . . *regardless of whether such service is provided indiscriminately to eligible users on a commercial basis.*" 47 U.S.C. § 332(c)(1) (emphasis added). To distinguish private carriage from common carriage, this section prohibits private land mobile licensees from reselling telephone exchange or interexchange service to land mobile users.

25. Because SMR licensees do not resell interconnected service, they are not common carriers under Section 331(c)(1) of the Act, regardless of who their customers are. Their private carrier status is not affected by an expansion of end user eligibility. The legislative history of the Communications Amendments Act of 1982 indicates that the reference to "eligible users" in the general definition of the private land mobile service in Section 3(gg) was *not* intended to restrict the Commission's authority to expand eligibility. On the contrary, Congress specifically recognized the Commission's broad discretion to add to and modify the services that could be provided to private radio licensees.[21] In Section 331(a)(3) Congress specifically provided that the private radio services should be accessible to the largest feasible number of users. For all of these reasons, expansion of SMR user eligibility to individuals and federal government entities is consistent with our statutory authority and will not alter the private carrier status of SMR licensees.[22]

26. *Compatibility and Spectrum Demand.* The commenters opposed to the proposal argue that expanding eligibility will increase demand for SMR spectrum by end users and, consequently, requests by SMR licensees to obtain channels from non-SMR categories through intercategory sharing.[23] This, they fear, will reduce the amount of spectrum available in those categories. For example, API argues that expanding SMR end user eligibility may, by promoting increased use of 800 and 900 MHz spectrum for SMR service, decrease the number of channels avail-

able for non-SMR eligibles. The Commission must. API continues, maintain adequate spectrum for single-user systems.[24] Big Rock Communications Company states that the SMR spectrum is too crowded to support an expanded pool of end users.[25] GE argues that the federal government already has enough spectrum of its own to provide for the communications needs of its agencies. It states that allowing federal government entities to use SMR capacity could result in exclusion of service to the business and industrial users the SMR service was intended to serve and could compromise future attempts to gain allocations of additional SMR spectrum.[26] SIRSA opposes expansion of SMR end-user eligibility, arguing that individuals and federal governmental entities already have adequate alternatives to meet their communications needs.[27] Moreover, some fear that if individual end users are permitted to use SMR service and want interconnected communications, there will be insufficient spectrum available to meet the needs of traditional private radio dispatch use. The result, these commenters state, would be less efficient use of the spectrum because there would be fewer people on the channels for longer periods of time, resulting in decreased service to existing users.[28]

27. Most of the commenters supporting the proposal filed only very brief comments, limited to indicating support without extensive analysis.[29] Those filing more extensive comments in favor of the proposal agree with our analysis in the *Notice* that SMR licensees can make selective and individualized decisions concerning the end users that share the system. Thus, expansion of the definition of eligibility does not mean that the SMR licensees must provide service to any party that is eligible. On the contrary, under the concept of SMR service as the Commission established it, SMR licensees may exclude a particular class of users if they do not choose to provide service to that group.[30] Therefore, the supporters assert, expanding eligibility need not cause spectrum shortages nor should it cause deterioration of the quality of communications. They argue that the disadvantages alleged by the opponents do not outweigh the advantages to be gained by increasing SMR flexibility through the expanded eligibility.

28. They also point out that expanding eligibility would benefit both the public and the SMR industry. NTIA, for example, notes that in some situations it may be more efficient and cost-effective for the federal government to use SMR systems than to construct and support its own systems. The commenters further argue that expanding eligibility will create a larger base of potential customers and might make it economically viable for new SMR systems to operate in areas not previously served by SMR service.[31]

Decision

29. We do not find the arguments against expanding eligibility persuasive. First, with regard to spectrum availability, it is certainly true that increasing the potential customer base for SMR licensees could increase SMR spectrum use and lead SMRs to seek access to non-SMR spectrum. We do not, however, see this as publicly detrimental. It is, rather, publicly beneficial because it should promote greater utilization of the spectrum consistent with the policies we outlined when we adopted our intercategory sharing rules.[32] Under those rules, any SMR seeking access to non-SMR channels must show that there are no SMR channels available and that the SMR has sufficient users to warrant authorization of additional channels. Even then, the SMR licensee may only obtain one more channel than its current loading warrants. Moreover, the SMR licensee can only get a channel as yet unassigned in the other pool. Thus, an unused channel would be used to meet a public need; meeting existing demand is better than leaving spectrum unused. Under these circumstances, we do not find the opponents' spectrum shortage argument compelling.

30. Similarly, we do not find compelling the commenters' arguments that expanding eligibility will make service less available to currently eligible users. SMR licensees have discretion to choose the end users they serve and, thus, may be expected to serve those users who are most compatible with their service offerings. Expanding eligibility to include federal government entities and individuals simply increases the number of *potential* SMR users. It does not require any SMR to serve either group and it will not necessarily cause SMRs to displace current users. In addition, aggregating demand can result in greater efficiency and increased ability of the licensee to serve more end users on the same spectrum.

31. Nor do we find compelling the argument that increased interconnection between SMR services and the public switched telephone will increase the average length of SMR communications and, therefore, will result in more crowding of SMR spectrum and less availability of that spectrum for traditional dispatch use. The Commission already has allowed SMR licensees to offer interconnection and to determine how they offer the interconnection option.[33] SMR licensees, therefore, have discretion over whether to offer interconnection on their systems and, if they do, to determine how many end users may use that option and for what time periods. In addition, SMR licensees must meet loading standards. *See* paras. 61-71, *infra*. Increasing the number of potential SMR end users should not, therefore, in itself cause a shift toward interconnected service. The SMR industry has been built primarily as dispatch service. The dispatch market is now well-established, and SMR operators have been very successful in serving that market. There is no reason to believe that they will abandon this successful service in favor of a greatly expanded interconnect offering, especially in light of the on- going loading requirement (*see* paras. 51-72, *infra*).

32. Nor are the commenters' arguments that we should not expand eligibility to the federal government because the federal government has its own spectrum persuasive. As NTIA points out in its comments, it is not always economical for federal government entities to operate their own systems. Since it does not have access to 800 MHz frequencies, it must seek service from radio common carriers if it desires to operate in that band. We have received and granted several waiver requests for permission to serve the federal government on SMR systems in instances where common carrier service was unavailable or unable to meet the government's specialized needs. We have granted waivers to permit the federal government to use private radio spectrum in situations where the government had no other available alternatives.[34] In view of this demonstrated need, we conclude that there is no basis for continuing to exclude the federal government as an SMR end user. With regard to concerns that federal operations are incompatible with the needs of other end users, we note that federal government participation on SMR sys-

tems should be no more disruptive than the operations of state and local government agencies which have always used SMR systems without adverse consequences.

33. We conclude that restricting SMR service to entities presently eligible under Part 90 eliminates an option for individuals and federal government entities needing all available land mobile communications service alternatives. Presently, these parties must contract with cellular or radio common carrier operators for mobile radio service.[35] These service providers, by virtue of their common carrier status, may not be able or permitted to meet specialized requirements of certain customers. Also, SMR service often may be obtainable more quickly and less expensively than other services and can provide efficient radio transmission to individuals who previously could not obtain or afford radio service. This is particularly important in areas having limited telephone or domestic public land mobile service.

34. Finally, broadening individual user access to the SMR service should encourage more intensive use of that spectrum in remote markets where it is not saturated. The public interest is disserved in these markets when those with mobile communications requirements have limited options while spectrum is idle because of restrictions in our Rules against serving individual users.

35. Accordingly, we conclude that end user eligibility should be extended to individuals and the federal government. This action will increase the communication options available to individuals and the federal government, increase the potential customer base for SMR operators, especially in rural areas, and enhance spectrum efficiency.

B. *Transfer of Subpart M Channels to the SMR Pool*

Background / Proposal

36. The merger of Subparts M and S requires that we decide what regulatory treatment to afford the 200 trunked channels now governed by Subpart M. Subpart M spectrum allocations have been based on technology (*i. e.*, trunked vs. conventional operations). Subpart S allocations have been based on radio service categories or pools.[36] The *Notice* proposed to transfer the 200 trunked channels under Subpart M into the SMR pool of Subpart S. *Notice*, 1 FCC Rcd at 814. We noted that most of the use of those channels was already by SMR operations. Further, we proposed to grandfather any existing non-SMR licensees.

Comments

37. We received five comments on this issue.[37] Several non-SMR commenters oppose our proposal because it would reduce non-SMR access to those channels. AAR recognizes that in most of the major markets these channels are all occupied by SMRs, but contends that, in other areas, non-SMRs interested in the channels would be discouraged if they were required to go through intercategory sharing procedures to gain access to them.[38] API argues that requiring non-SMRs to resort to intercategory sharing for access to these channels is needlessly burdensome.[39] SIRSA strongly suggests that the Commission leave the 200 trunked channels intact as a separate category to allow applicants more flexibility in their choice of channels. SIRSA states that single users should have the option to establish their own trunked systems, rather than being required to resort to SMRs.[40] NABER, on the other hand, supports our proposal and suggests grandfathering any non-SMR interests already using these channels.[41]

Decision

38. After careful consideration of the comments, we have decided to transfer the 200 trunked channels into the SMR pool as proposed. On balance, we find for the following reasons that it is in the public interest to designate these channels for the category where they are used the most and where the demand for them is the greatest. Over 99 percent of the systems now operating on these channels are SMR systems. In most of the major markets, all of the channels are occupied by SMRs. While the present use may be indicative of the ability and nature of SMR licensees to acquire channels more quickly than individual non-SMR applicants, these channels have been available to all entities since they were originally allocated for private land mobile radio use. There has been no restriction on access by non-SMRs. Yet today, only thirteen licensees on these channels are non-SMRs, and all applicants on the waiting lists are applying for SMR systems.

39. We recognize that we are affecting non-SMR access to these channels by placing them in the SMR pool. New non-SMR applicants, for example, will not be able to apply directly to obtain these channels. For these applicants, however, unused channels may still remain in their own pools, including channels in the 900 MHz bands. Existing non-SMR licensees who have not fully loaded their systems will not have direct access to the channels in the SMR pool. Such systems, however, currently cannot obtain additional channels, either in the SMR pool or in the licensees' own pools; no licensee can obtain additional channels if its existing channels are not fully loaded. Fully loaded non-SMR systems, on the other hand, will continue to have access to channels in the SMR pool. Under the Commission's intercategory sharing rules, channels in one pool are available to eligibles in another pool.[42] These rules are not burdensome and should not discourage those non-SMR eligibles from applying for intercategory sharing of the SMR channels.

40. Placing these trunked channels in the SMR pool simplifies and streamlines our processing procedures for SMRs. If we were to designate some of the 200 channels for the other pools, the SMR licensees currently on those channels would be subjected to significantly different operational and regulatory environments.[43] For example, the Commission makes assignments directly to SMR stations using fixed mileage co-channel separation criteria. Non-SMRs, on the other hand, use the services of recognized frequency coordinators in the protection and assignment of stations. Administratively, by integrating the 200 trunked channels into the SMR pool, we establish a single procedure for SMR systems at 800 and 900 MHz.[44] This will simplify the application process and, in turn, will speed service to the public.

C. *Processing and Assignment Procedures*

Background

41. In our *Notice* we discussed in detail the two different processing and assignment procedures for licensing systems under Subparts M and S.[45] Under either subpart the Commission generally relies on the "first come, first

served" concept in granting licenses in the private land mobile radio services. When, however, applications are filed that cannot be granted because insufficient channels are available to satisfy all of the requests, the Commission processes these applications pursuant either to a "waiting list" or a "notice/lottery" procedure identified by the applicable subpart.

42. Waiting lists are used in the assignment of channels now governed by Subpart M. This procedure was established by the Commission in its *Report and Order* in PR Docket No. 85-6[46] and described in Section 90.360 of the Commission's Rules, 47 C.F.R. § 90.360. A waiting list in a particular area is created when the Commission receives an application for channels in Subpart M which cannot be granted because all channels are already licensed in that area. As more applications for channels in that area are filed, they are placed on the waiting list in chronological order (*i. e.*, by filing date). When the applicant is requesting channels to expand an existing fully-loaded system, the application is ordered on the waiting list above those seeking channels for a new system. A waiting list therefore consists of two groups of applicants: 1) those licensees with fully loaded trunked systems, and 2) all other eligible applicants. As channels become available for further assignment, they are assigned first to fully loaded trunked applicants and then to the other eligibles. *See* 47 C.F.R. § 90.360(c).

43. Under Subpart S the Commission processes SMR applications as they are filed with the Commission. If an acceptable application is filed and there are channels to satisfy the request, the application is granted. If, however, an application is filed that cannot be granted because of channel unavailability, the application is dismissed rather than placed on a waiting list for future action. As SMR channels that were previously licensed become available, the Commission issues a public notice identifying both the channels and the date after which new applications for those channels will be accepted. If we receive more applications than can be accommodated, a lottery is held to determine grants from applicants that are considered equally qualified based on comparative criteria.[47] When analyzing the merits of applicants in a lottery for SMR channels, we award one comparative point for applicants proposing trunked systems and an additional comparative point for applicants proposing to expand existing fully-loaded trunked systems. Applications not granted in this process are dismissed because, once again, no channels are available.[48]

44. As pointed out in the *Notice*, both procedures have certain advantages and disadvantages from the Commission's as well as the public's standpoint, *Notice*, 1 FCC Rcd at 815-16. When there are waiting lists, applicants need only file one application for channels in a particular geographic area to be considered for any channels that become available. This speeds the Commission's processes and the time to grant an application once channels become available and minimizes the applicant's costs and efforts. Our early administrative difficulties in administering this procedure have been alleviated, and it is now working smoothly.

45. The Commission departed from the waiting list approach in adopting the rules in Subpart S because we thought that the notice/lottery procedure would be less burdensome than maintaining and updating lengthy waiting lists. Lotteries provide an equal chance to all applicants within each comparative group. While this process is fairly straightforward, it has significantly increased the workload on the Commission's staff due to the large number of applications generated by our notices and the handling of subsequent lotteries. Additionally, the public must monitor the availability of channels and repeatedly file individual applications to participate in separate lotteries as channels become available.

Proposal

46. After considering the advantages and disadvantages of each procedure, we proposed to use a unified waiting list for all SMR channels, *Notice*, 1 FCC Rcd at 816-17. We concluded that, based on our overall experience, waiting lists would expedite reassignment of channels by eliminating the delay associated with the notice and lottery procedure.

Comments / Discussion

47. Fourteen parties commented on this issue. All of these commenters support our proposal, adding that fully-loaded systems should continue to be given preferred status over other applicants. These commenters make three points. First, they assert that channels can be reassigned almost immediately under the waiting list process, while with the notice/lottery procedure it may take several months to reassign channels after they have become available.[49] The commenters also express a general sentiment that the waiting list procedure "enables applicants to assess their prospects for securing channels and to monitor their progress toward spectrum relief . . . [I]t thus facilitates business planning."[50] It is much easier, the commenters argue, to file an application for the waiting list and monitor its progress than it is to submit applications for filing windows and lotteries where the chances of actually receiving channels are uncertain.[51] Finally, the commenters state that the use of waiting lists combined with preferences for fully loaded systems promotes the most equitable and spectrally efficient method of processing and assignment.[52] Although both lotteries and waiting lists award preferences to fully loaded trunked systems seeking to expand, the waiting list procedure, according to the commenters, provides for the assignment of channels first to those applicants that are most overloaded or that have been fully loaded for the longest time. This, in turn, provides relief to end users that have been using a fully loaded system for the longest time.

Decision

48. After review of the comments, we have decided to adopt our proposal to use waiting list processing and assignment procedures for channels in the SMR pool in Subpart S.[53] These procedures will expedite the Commission's reassignment of channels without the delay associated with the window and lottery procedures. *See Notice*, 1 FCC Rcd at 815. Also, we agree with the commenters that waiting lists provide applicants with a surer, quicker system for monitoring the progress of their submissions as we now update and publish our waiting lists by quarterly public notices.[54] Applicants are able to check easily the status of their applications as of the date of the last waiting list public notice. Furthermore, unlike notice/lottery process, an applicant for channels in a "wait list" area will only have to file one application and filing fee, which will save the applicant both time and money.

49. In making the transition from waiting lists established under Subpart M to waiting lists that will include applicants for all of the SMR channels, we will work initially from the current waiting lists.[55] Applicants on the existing 800 MHz lists will maintain their places and will be in line not only for the 200 channels from Subpart M but also the 80 channels now in the SMR pool in Subpart S.[56] If a new application is filed for channels in the SMR pool, and there is already a waiting list in the area requested, that application will be placed on the waiting list in chronological order according to its filing date and any entitlement to a preference. If a new application is filed and no waiting list exists, but the application cannot be granted because all channels have been assigned, that application will initiate a new waiting list. Subsequent applications in that same area will be added to that list according to the same criteria. Similar procedures will be used for the separate 900 MHz waiting lists when they become necessary.

50. Our concern here has been to select a procedure and transition mechanism that is fair and considers the rights of all parties. We have concluded that the procedure we establish here is fair and best protects the rights of all applicants. All applicants have been on notice since the date of the *Notice* that our processing and assignment procedures were under review and subject to change. *See Notice* at 814-817. The *Notice* also indicated our tentative preference for the waiting list procedure. *Notice* at 816. As the Court made clear in *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987), applicants do not have any vested right in the continuation of any agency procedure, particularly where notice of a possible change in procedure has been given. Applicants that have failed to obtain channels through lotteries, therefore, may file new applications. Those applications in waiting list areas will be added to the waiting lists according to any preferences for which they might qualify.

D. *Loading*

Background

51. We first introduced loading standards for private land mobile services in our Docket 18261 proceeding.[57] We adopted loading standards to enable us to set standard levels of channel occupancy, to provide potential users with a means to determine channel availability, to provide a means to determine whether a licensee of conventional channels was entitled to shared or exclusive use of a channel and to help ensure efficient use of the spectrum. We revisited the question of loading standards in our Docket 18262 proceeding[58] when we reallocated spectrum in the 806-947 MHz band to accommodate land mobile growth. In setting loading standards in Docket 18262, we considered a variety of factors including average message length, number of operating units, typical numbers of times per hour that dispatchers and mobiles originate calls, sizes of systems, and functions and activities of licensees.

52. In PR Docket No. 79-191, which released the remaining 250 channels held in reserve by Docket No. 18262, we decided to revisit the loading rules.[59] We altered the loading standards for all trunked channels governed by Subpart S to encourage greater use of the spectrum. Instead of providing for a five-year loading deadline of 70 mobiles per channel, as we had done in Subpart M,[60] we required the new systems to be loaded to 60 mobiles per channel within three years and 80 mobiles per channel within five years of authorization.[61] We also established a channel recovery program that specified that any systems that failed to meet these standards would lose all channels not loaded to 100 mobiles each.[62] We also adopted rules to allow existing trunked licensees loaded to 70 mobiles per channel to be placed on waiting list for Subpart M trunked channels.[63] In addition, we modified the Subpart M and S rules to permit existing trunked licensees to obtain additional channels when their systems were loaded to 80 mobile units per channel.[64]

Proposal

53. In our *Notice*, we proposed to eliminate loading standards for SMRs and other trunked private systems to allow maximum flexibility in marketing and expanding such systems and in providing various service options for end users. *Notice*, 1 FCC Rcd at 810-14. We recognized that loading standards have played a major role in the development of the 800 MHz band and most particularly the SMR industry. Because we considered the SMR market to be mature, we proposed to eliminate the applicable loading standards. We stated that the emphasis on quantity of users over quality of service inherent in loading standards may distort the SMR market and prevent SMR operators from providing some needed communications services. *Notice*, FCC Rcd at 814. We proposed, therefore, to allow licensees greater freedom from regulation by eliminating loading.

54. We also asked for comments on four alternative approaches to loading standards: (1) using loading standards only as a mechanism to determine eligibility for an SMR licensee to obtain additional channels within a market; (2) using loading only as a criterion for evaluating interpool sharing requests involving SMR systems; (3) retaining existing loading standards as set forth in Subpart S; and (4) retaining existing Subpart S loading standards only in designated areas of the country. *Notice*, 1 FCC Rcd at 813-14.

Comments / Discussion

55. Twenty-four parties commented on the issue of loading. Virtually all of the commenters agree that loading standards have served a useful purpose in developing the SMR industry. AAR, however, states that the public interest would be served by elimination of loading requirements not only for SMRs but also for non-SMR trunked and conventional stations as well.[65] Atcomm agrees that all loading standards for the 800 MHz band should be eliminated.[66]

56. Many of the commenters support reduction or elimination of loading requirements in rural areas, although they differ as to the definition of "rural" and the requirements that should remain. [67] ASNA states that there is likely to be enough spectrum to meet service demands without compromising the availability of dispatch service in all areas outside the top 25 metropolitan markets and supports elimination of loading requirements for trunked SMR systems in those areas.[68] Motorola recommends reduction of loading standards outside certain named "urban" or "super-urban" markets to 40 percent after every five year license term to retain channels or expand systems.[69] SIRSA agrees that loading requirements are unnecessary in rural areas but points out difficulties that could arise as areas, once rural, become congested.[70]

57. The commenters in favor of loading standards argue that they promote spectrum efficiency and prevent spectrum hoarding or "warehousing."[71] They argue that our loading standards and channel recovery program have been critical to the success of the SMR industry and should be retained. As ASNA states in its comments, the loading requirements "have proved to be reasonable and effective regulatory tools . . . they have prodded the industry to focus its attention on serving dispatch communications needs, without neglecting useful ancillary services."[72]

58. Many of the commenters assert that loading requirements are necessary to accommodate the long-range spectrum needs of two-way dispatch users. They fear that, without loading standards, interconnected service will become the predominant SMR service and that dispatch service will decline. These commenters argue that the Commission recognized the demand for dispatch service and that alternatives are available to users who want interconnected service, such as cellular radio.[73] Motorola states that "the key reason for loading standards has been to assure that the needs of private dispatch users for good quality service and the needs of the Commission to provide for efficient use of the spectrum are met."[74]

59. Those commenters that are non-SMR licensees or associations representing non-SMRs, such as SIRSA, API and UTC, argue that the elimination of loading standards will be detrimental to their services. SIRSA points out that private land mobile spectrum is extremely congested in many areas and that there are far more potential users than can be served on currently allocated spectrum. SIRSA states, "Excessive interconnection and chronic underloading are luxuries the Commission and the public interest can ill afford on a wide-scale basis on these frequencies."[75] SIRSA regards retention of loading at least as a precondition for interpool sharing as critical. Without loading requirements or some other measure of channel usage, users will apply for all unassigned channels in a given area and spectrum will not be available for use by primary single user systems.[76] Our existing rules require that SMRs requesting frequencies from another pool must have systems that are 70 percent loaded. API and UTC assert that without such loading standards for interpool sharing, SMR applicants that cannot obtain channels from the SMR pool will exhaust non-SMR channels through interpool sharing.[77]

60. Several commenters address the issue of using loading standards to assess the needs of existing systems to obtain additional channels through the waiting list or through interpool sharing.[78] Motorola, NABER, and API suggest that we enforce loading standards in the non-SMR pools[79] and also beyond the first five years.[80] A few commenters suggest that because the 900 MHz band has been released only recently, different loading standards be applied to the 800 MHz and 900 MHz bands, rather than applying the same standards to both.[81]

61. Several commenters favor eliminating the requirement in Subpart S that trunked licensees must load to 60 mobile stations per channel within 3 years of the license grant.[82] These commenters favor using one five-year period to measure loading levels as we do currently under Subpart M. They are concerned that the new 900 MHz systems will not be able to meet the 3 year loading deadline of 60 percent because there are so many systems competing in the same markets. Several new systems per market are being authorized simultaneously and thus will be competing for users at the same time, making it difficult to load. Moreover, the new systems must also compete with one another for transmitter sites and must obtain new 900 MHz equipment, which will be in great demand. Additionally, these new systems will be competing against existing, established 800 MHz systems.[83]

62. The commenters vary in their recommendations for loading levels, but generally indicate that they want a reduction from the current standards. For example, ASNA recommends that the three-year loading requirement for a trunked SMR system in the 900 MHz band be twenty percent, that the five-year standard to retain frequencies be fifty percent, and that licensees be eligible to expand their systems when their systems are loaded to seventy percent.[84] Autotel proposes a standard of forty units per channel in five years.[85] Metro Mobile favors a standard of seventy units per channel as the basis for addition of channels and awarding waiting list preferences.[86] NABER proposes a minimum loading requirement of seventy units per channel for trunked 800 MHz systems in the ten largest urban areas, with five-year loading deadlines.[87]

Decision

63. We have concluded that the public interest would be served by making some changes in our current loading policies. As discussed in the *Notice*, we recognize that loading standards have served a number of very useful functions in helping to regulate the SMR industry and the use of the 800 MHz band in general. Loading standards tell us when channels appear to be underutilized or congested, enabling us to reassign channels from licensees that are not using them to others. Loading standards also affect the SMR market, however, by causing a system's value to decrease as it approaches its loading check points if it is not fully loaded. Additionally, they reduce licensees' options to provide services that do not support a high mobile loading count, such as extensive provision of interconnected service.

64. As noted above, there are now three loading standards that apply to systems above 800 MHz. We are adopting one standard that will be used for all purposes. Essentially, we have decided to adopt the standard now contained in Subpart M of the rules. This standard will accomplish our objectives of maximizing spectrum efficiency and increasing flexibility. It responds to requests that loading standards be reduced to permit flexibility and also accommodates the requests of those who urged us to maintain a high loading standard to encourage spectrum efficiency.[88] Use of this standard will ensure that a substantial level of spectrum efficiency is maintained and that licensees have some flexibility in designing their systems. We have, however, made certain adjustments in our use of this loading standard. As explained below, we are retaining loading standards as guidelines for determining when a licensee may obtain additional channels and for determining channel exclusivity.[89] We have decided, however to phase out our channel recovery program. Furthermore, we are eliminating the three-year loading requirement.

65. As several commenters noted, our channel recovery program has performed well as a mechanism to nurture a fledgling SMR industry so that it might grow into a position of prominence and maturity in the communications field. Mature industries often do not need the oversight necessary at their inception, however, and that is true of the SMR industry. The rapid development of the SMR industry and of end-user demand for service have created

strong incentives for SMR operators to use their channels efficiently and intensively. We can now let those incentives operate with minimal government intrusion.

66. Accordingly, we have decided to phase out our use of loading standards as a trigger for automatic cancellation of channels that a licensee has not fully loaded. By allowing licensees to assign a portion of their trunked authorization, as discussed below, we will allow the industry itself to accomplish the same goals we set out to achieve in our recovery program, and in a more efficient manner. The channel recovery program has been used to recover channels from licensees with systems not loaded to prescribed levels so that these channels can be reassigned either to a new licensee or to a licensee seeking to expand a system in a geographic area with spectrum shortages. This program was initiated at a time when there was serious concern that significant numbers of channels could be assigned but unused. Moreover, while the number of channels recovered due to failure to meet our loading standards was high in the first years of the program, as the industry and end-user demand have matured the number of channels recovered has decreased dramatically. An analysis of our five year channel recovery actions reflects that for 1987 the number of channels recovered was only 24 percent of the number recovered in 1983. In 1986 it was only 25 percent of the 1983 recoveries. There has been a downward trend in loading failures in each year of our program. Unused channels can be more efficiently reassigned to licensees who need them through the workings of the marketplace and, as discussed below, we are adjusting our rules to permit partial assignments.

67. We anticipate that our new rules regarding partial assignments will enable trunked system licensees with unused or underutilized channels to assign them either to someone establishing a new system or to someone expanding a fully loaded system. We shall, therefore, phase out our channel recovery program based on loading standards and rely on marketplace transactions to reallocate underutilized channels. We find, however, that a transition period to allow for business planning and to avoid shock to the market that an abrupt change might cause would serve the public interest. We shall, therefore, continue to impose a five year loading requirement of 70 mobiles per channel, as discussed above, for any system licensed before June 1, 1993.[90] Systems licensed after that date will not be required to meet any loading requirements to retain their channels.

68. Our use of loading standards to determine whether a licensee of an existing trunked system can obtain additional channels to expand is fully consistent with our existing provisions in Subparts M and S. Under Subpart M, an existing licensee must have 70 percent loading to apply for additional channels.[91] Under Subpart S, additional channels can be obtained from another service category only by "fully-loaded" systems.[92] In this merger, we have combined features of the provisions in both subparts. Loading standards will be retained for the purposes discussed below even after our channel recovery program has ended.

69. As mentioned, we are retaining loading standards generally to determine when a licensee of an existing trunked system can acquire additional channels for expansion. That is, should an existing trunked system licensee want to apply directly to the Commission for additional channels or apply to obtain additional channels on an intercategory sharing basis, or apply to obtain channels assigned from another licensee, it must first have its existing trunked system loaded to 70 mobiles per channel. This policy sets forth a condition that before a trunked licensee can obtain additional channels for its exclusive use, it must demonstrate that it is using its authorized channels to an acceptable level.

70. We have, however, adjusted this requirement for those areas where demand for the 800 and 900 MHzNotice, we solicited comments on a proposal originally put forth by ASNA urging us to relax our loading requirements in rural areas so that existing trunked SMR systems in those areas could more easily expand.[93] The existing rules do not permit a trunked system licensee to obtain another trunked system within 40 miles of its existing system unless the existing system is fully loaded.[94] ASNA suggested that these requirements restrict the expansion of rural systems in areas where spectrum is available, thus precluding the development of larger trunked systems that can provide a higher quality of service.

71. Many of the commenters in this proceeding favor some change in our policies regarding loading standards in rural areas.[95] We agree that there is no clear public benefit to requiring that trunked SMR systems in rural areas meet a threshold loading standard before they can expand their systems. These rural SMR systems have a unique opportunity to offer a range of specialized mobile communications services on larger systems. Accordingly, we are amending our rules to permit SMR trunked licensees in rural areas to obtain five more channels than they have constructed, up to a system total of 20 channels. For example, a five-channel system may obtain five additional channels regardless of their current system loading. To add an additional five channels (to a total of fifteen), however, the licensee must show that the first five channels are fully loaded. We define rural areas as areas beyond a 100-mile radius of the centers of the nation's top twenty metropolitan areas[96] *and* without an 800 and/or 900 MHz waiting list for private land mobile licensing.[97] Should an area that does not currently have waiting lists and that is outside the 100 mile radius of the top 20 metropolitan areas experience spectrum shortages that require that a waiting list be established, systems that have expanded in that area will become subject to loading requirements on all channels. To this end, licensees must fully load their systems within one year of the date the waiting list is established or by the end of their license term, whichever is longer.

72. A significant number of commenters proposed elimination of the three-year loading requirement now in Subpart S.[98] We recognize that the introduction of new 900 MHz SMR systems will foster intense competition for equipment and customers and make the three-year loading deadline difficult to meet. A single five year standard will allow licensees adequate time to market and load their systems and will provide an effective means of ensuring spectrum use. We, therefore, will abolish the three-year loading requirement.

E. *Partial Assignments*

Background / Proposal

73. A partial assignment is an assignment of less than the full number of channels for which a licensee is authorized. Our rules currently prohibit the partial assignment of an 800 MHz or 900 MHz SMR trunked system authorization.[99] This prohibition dates to the origi-

nal allocation of 800 MHz channels in 1974, when trunked channels were assigned in groups of 5, 10, 15 or 20 channel blocks. Our goal in assigning channels in this way was to create large, spectrum efficient trunked radio systems. In parallel with this channel assignment scheme we decided to prohibit partial assignments of such systems. We were concerned that permitting partial assignments could lead to the dismantling of the larger, more efficient trunked systems and thus a reduction in the total capacity of the allocation.

74. Beginning in October 1982, we no longer assigned channels to SMR applicants in large channel blocks. Rather, we limited trunked channel assignments in the 800 MHz band to five channel blocks.[100] When we allocated channels in the 900 MHz band for trunked SMR use, we limited channel assignments to ten channel blocks.[101] This new policy of assigning smaller channel blocks to applicants was designed to maximize the number of SMR licensees in a given area and to reduce the likelihood of individual licensees hoarding spectrum.

75. Use of the 800 MHz band, as well as the demand for 900 MHz SMR facilities, has progressed to the point where it should no longer be economically attractive for licensees to hoard spectrum in major metropolitan areas because of the substantial demand for trunked SMR service. Over the past five years we have had requests from trunked SMR licensees to assign their unused channels to other SMR licensees who have congested systems but are unable to obtain more channels. With the increase in competition among SMRs over the last two years, such requests have become more frequent. *Notice*, 1 FCC Rcd at 817. In light of all these factors, and the greater flexibility that permitting partial assignments might give SMRs, we proposed to eliminate the prohibition on partial assignments.

Comments / Discussion

76. All nine commenters addressing this issue support our proposal to permit partial assignments of trunked SMR facilities.[102] Autotel, ASNA, Motorola, NABER, and NMRA suggest that partial assignments only be permitted where the proposed assignee is a fully loaded system. Adding a further condition, ASNA, Motorola, and NABER state the Commission should only permit partial assignments where the assignee's system has more channels than the assignor's system. These three commenters observe that the partial assignment of SMR channels can enable an SMR licensee to avoid the recovery of underloaded channels by assigning them to another system.[103] They fear that channels would not be used to the maximum, but rather merely shuffled between cooperative pairings of licensees. To combat this, ASNA specifically requests that the Commission prohibit an assignee from subsequently reassigning its channels during its license term.[104]

77. Autotel and Metro Mobile, two SMR system operators, raise other concerns related to the partial assignment of authorizations. Autotel notes that under the current rules, when channels are acquired from another SMR licensee, the assignee's system must assume the original loading date of the assignor's channels.[105] Autotel recommends the assignee be given a new five- year loading date.[106] Metro Mobile favors permitting partial assignments but is concerned that licensees may use partial assignments to create conventional SMR systems.[107]

Decision

78. We initiated this reevaluation of the prohibition on partial assignments because of the maturity of the SMR industry. In addition, we wanted to grant licensees the maximum amount of flexibility to manage their systems, consistent with our regulatory objectives of ensuring efficient use of the spectrum, increasing service options to end users, and fostering a competitive SMR industry. After thorough consideration of the comments, we conclude that permitting the partial assignment of trunked SMR authorizations will provide an efficient mechanism for unused channels to be employed either to set up a new mobile communications system or to expand an existing system. This action is consistent with our desire to ensure efficient use of the spectrum with a minimum of government intrusion into the operations of the SMR market.

79. We will therefore permit an SMR licensee to make a partial assignment of its authorization either to an applicant proposing to create a new system or to an existing licensee that has loaded its system to 70 mobiles per channel and is seeking additional channels to expand that system, subject to the filing of an assignment application and our approval of the application. An applicant seeking to expand an existing system or to create a new system with channels it obtains through partial assignment will receive the assignor's existing license expiration date and loading deadline. In essence, the new licensee stands in place of the original licensee. In addition, to discourage a licensee from assigning channels merely to avoid a channel recovery action, we shall prohibit a licensee that has assigned some of its channels from obtaining additional channels for the system through subsequent assignment, intercategory sharing or other Commission assignments for a period of one year.[108]

80. These decisions are responsive to the concerns raised by the commenters yet consistent with our desire to foster a competitive SMR industry by facilitating market entry. By requiring that existing systems be loaded to the 70 mobile stations per channel standard before they can be assigned additional channels, we maintain a base level of spectrum efficiency in a given geographic market area. We disagree with the suggestions of some commenters that the Commission require the assignee's system to be larger than the assignor's system. Even if channels are transferred from a "larger" system to a "smaller" system, the theoretical spectrum efficiency lost by the transfer of channels from the larger system will be nearly offset by the gain in efficiency that accrues to the system receiving the channels. Licensees loaded to the 70 mobiles per channel standard have proven their ability to operate spectrum efficient systems and they should be eligible to increase their spectrum efficiency by adding unused channels from another SMR licensee.

81. With regard to the partial assignment of channels to establish a new system, we recognize that the above discussion concerning offsetting efficiencies does not apply. It is, however, in the public interest to permit such partial assignments. New systems, whether created by partial assignments or acquisition of channels from the FCC, enhance competition in the SMR industry. Such competition should spur greater innovation and service to the public. To prohibit partial assignments of channels to establish new systems, and only permit it for existing fully-loaded systems, would be an unwarranted intrusion into SMR marketplace. Such intrusion would seriously limit the options available to SMR licensees as well as possibly restrict

the entry of new parties as licensees of new systems. Our current rules permit the assignment of a total SMR system to a new system licensee with no change in the required loading dates. Permitting the partial assignment of channels to new system licensees is a logical extension of this policy, and one that will facilitate the offering of new communications services by new entities entering the industry.

82. ASNA has requested that we also prohibit an assignee from subsequently reacquiring its channels during its license term. ASNA's suggestion is intended to reduce incentives for channel shuffling. The mechanisms outlined above that require existing systems to be fully loaded, and to carry-over the assignor's loading deadline, will adequately reduce any incentives for channel shuffling. Furthermore, our decision to phaseout the channel recovery program will eventually eliminate the reason for channel shuffling discussed in the comments.

83. Eliminating the prohibition on partial assignments introduces economic incentives for licensees that are unable to use all of their channels to the maximum extent to separate them and allow others to put them to immediate use to provide mobile communications service. The regulatory flexibility inherent in the concept of partial assignments will facilitate the creation of additionai communication service providers or the improvement or expansion of existing service offerings. These transactions can take place quickly, without the delay involved in Commission channel recovery and reassignment proceedings. By allowing licensees to make partial assignments of trunked systems under these conditions, we are allowing marketplace forces to operate more freely without undermining our spectrum efficiency goal.

F. *Technical Standards*

Background / Proposal

84. In our *Notice*, we discussed the unique nature of SMR service and how this service differed from the other private land mobile radio services. We pointed out that because of these differences, a non-traditional approach toward regulating the technical aspects of SMR operations seemed appropriate. We, therefore, proposed rule modifications that would permit SMR licensees greater technical flexibility in developing and implementing their systems. Specifically, we offered rule changes governing two technical issues: "channelling" and "mode of operation."

85. Section 90.613 of the Commission's rules, 47 C.F.R. § 90.613, requires 900 MHz licensees, including SMR licensees, to use 12.5 kHz channels for their normal operations. To permit flexibility in service options, however, Section 90.645 of the Commission's rules, 47 C.F.R. § 90.645, permits licensees of both 800 MHz and 900 MHz systems to combine channels to create 25 kHz or wider bandwidths. This gives licensees of such systems the ability to provide services, such as high speed digital transmissions, that require bandwidths wider than those routinely authorized by the Commission. Licensees who exchange channels to acquire wider bandwidths must, pursuant to Section 90.645, obtain prior approval of the Commission before taking such actions. In the *Notice*, we solicited comments on whether we should permit the use of non-standard channel widths and modulation schemes and aggregation of channel widths without prior notification and approval. We also solicited comments on whether Section 90.617(d) of our rules, 47 C.F.R. § 90.617(d), should be changed to give SMR licensees the flexibility to choose either the trunked or conventional mode of operation on the two hundred 896-901/935-940 MHz channels allocated for land mobile use in Gen. Docket No. 84-1233.

Comments

86. A number of parties commented on these issues. Big Rock Communications Company opposes our "channeling" proposal, stating that "the use of non-standard channel widths and modulating schemes by SMR licensees, without prior approval, would result in increased interference and low quality service for the end user."[109] NTIA, while generally opposing the usage of wider bandwidths, recognizes that "situations may arise in which, for valid operational and technical reasons, wider bandwidths are required."[110] It argues, consequently, that the Commission should review and approve all requests for the wider channel assignments. Zach Communications, Inc., Mobile Machines Corporation and NABER are generally in favor of the Commission's proposal. They also agree, however, that non-standard bandwidths should only be implemented if current interference criteria are maintained.[111] NABER additionally points out that the wider, non-standard bandwidths would also permit licensees to offer additional services to their customers. Three commenters, Motorola, ASNA, and SIRSA, express qualified concurrence with our proposal. They believe that technical flexibility is acceptable only if current loading standards are maintained. Motorola, in fact, offers a formula for the retaining of loading standards in an environment of non-standard bandwidths, stating that "if loading remains at 80 mobiles per channel for 12.5 kHz channel bandwidth, one of 25 kHz bandwidth [should] be required to load to 160 units per channel, a 6.25 kHz channel bandwidth system [should] be 40 units per channel, etc."[112]

87. With regard to our proposal as to mode of operation, General Electric expresses great concern. It believes that when technologies other than trunking are used in the SMR spectrum, there should be a determination that these technologies are "as efficient as trunking and [do] not cause unforeseen interference to other users and systems."[113] They also recommend that any waiver requests submitted by applicants proposing non-trunked operation be placed on public notice. NTIA took a similar position, stating that trunking requirements should be maintained, and further suggesting that the Commission have the "flexibility to approve deviations from trunking . . . requirements on a case-by-case basis."[114]

Decision

88. The SMR service offers a variety of features that differentiate it from the other private land mobile radio services. For instance, SMR operators serve a wide variety of users rather than one specific service group. The SMR service was created to make maximum use of available spectrum, while simplifying the licensing and channel distribution procedures for licensees, end users and the Commission. Modifications to our rules pertaining to the channelling and mode of operation of SMR systems will enhance the future success of this service by providing licensees the flexibility to respond to very specific customer needs.

89. As noted above, we solicited comments on permitting SMR licensees to use non-standard channel widths and modulation schemes without obtaining prior Commission approval. Upon review of the comments and the Commission's Rules, we are satisfied that our regulations currently provide sufficient flexibility to SMR licensees. Section 90.645(f) and (h) of the Rules, 47 C.F.R. § 90.645 (f) and (h), does not now require prior Commission approval to permit SMR licensees (and other exclusive licensees) to use non-conforming or non-standard bandwidths within their assigned channels. Under Section 90.645(g) and (h) of the Rules, 47 C.F.R. § 90.645 (g) and (h), however, licensees must obtain prior approval from the Commission to trade or exchange channels among themselves in order to obtain contiguous channels.[115] This approval is a prerequisite to any transfer or assignment of channels under Section 90.153 of our rules, 47 C.F.R. § 90.153.

90. The overriding concern with regard to mode of operation is that of allowing the SMR operators to have the flexibility to select and expeditiously put into operation the type of technology that serves their interests and the interests of their customers. While it is likely that trunked technology, with its inherent spectrum efficiencies, will be selected by most SMR operators, we recognize that there may be circumstances and conditions that might make other comparably efficient modes of operation more attractive.[116] We will, therefore, revise our Rules to permit operation of the 900 MHz SMR channels using both trunked and other comparably efficient modes of operation.

91. Although we are providing licensees with the flexibility to combine or split channels, or to use trunked or conventional channels, we remain concerned with efficient use of the spectrum. We expect that the number of licensees who will ultimately take advantage of this flexibility will be small, considering the expense of developing new equipment to meet these needs. In addition, the loading standards established earlier will be applicable and will ensure that spectrum will be used efficiently. With respect to systems that opt for bandwidths different from those of the original authorization, the loading standards shall be based on the number of mobile units per originally authorized channel bandwidth (i.e., per 25 kHz at 800 MHz and per 12.5 kHz at 900 MHz). With this clarification, the proper balance is maintained in providing the flexibility to meet the unique and changing requirements of the SMR industry while, at the same time, ensuring efficient use of the spectrum.

G. *Other Matters*

92. In the *Notice*, we clarified our policies governing the offering of for-profit service in the 800 MHz band and proposed to revise § 90.179 accordingly. *Notice*, 1 FCC Rcd at 819. We stated that our intention was to restrict 800 MHz private carrier operations to the SMR pool. The modifications made to § 90.179 in Docket 18921 were intended to permit for- profit, private carrier operations in the private land mobile frequency bands *below* 800 MHz. Specific rules governing the 800 and 900 MHz frequency bands exist that permit private carrier or SMR operations. The modified § 90.179 in Appendix B to this *Report and Order* reflects the fact that it governs only systems licensed to operate in the private land mobile frequency bands *below* 800 MHz.

93. In light of our actions in this proceeding, we will dismiss the Petition for Interim Relief filed on September 1, 1987, by Brown & Schwaninger as moot. The petition sought relief from the loading and construction standards for 900 MHz licensees.

III. REGULATORY FLEXIBILITY ACT FINAL ANALYSIS

A. *Need for and purpose of this action* :

94. The Commission takes this action to amend its rules to merge Subpart M of Part 90 into Subpart S of Part 90. This action creates a unified regulatory structure for the processing and assignment of SMR frequencies, permits partial assignments of constructed facilities, expands eligibility requirements for SMR end users, permits increased operating and technical flexibility, merges Subpart M channels designated for trunked technology into the Subpart S SMR service, and modifies the Commission's loading standards for trunked radio systems. The results of these amendments are to allow access to SMR systems to a greater number of people, to provide a consistent set of rules governing SMR systems and trunked radio systems at 800 MHz and 900 MHz, to encourage SMR licensees to maximize spectrum efficiency, and to create flexibility for SMR licensees to offer different types of communications systems.

B. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis* :

95. No comments were received specifically in response to the Initial Regulatory Flexibility Analysis.

C. *Significant alternatives considered and rejected* :

96. The Commission reviewed and considered all twenty-one comments and twenty-six reply comments to its proposal. The Commission adopted many of the alternatives presented by the commenters on several issues concerning loading standards, partial assignments, technical flexibility, and processing and assignment procedures. For example, the Commission's decision to expand the eligibility for SMR end users was supported by some of the commenters, but not by all of them. On balance, we anticipate that our decision will have a favorable impact on the public generally and small businesses and entities particularly. Small end users will benefit from the increased number of services that can be offered by SMR licensees. Also, the expansion of eligibility will allow SMR licensees to offer services to a larger number of end users that previously were barred from using SMR service.

IV. PAPERWORK REDUCTION ACT STATEMENT

97. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements and should decrease burden hours imposed on the public by allowing applicants to file once for the waiting list rather than submitting repetitive filings for filing windows and lotteries.

V. ORDERING CLAUSES

98. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that Part 90 of the Commission's Rules is AMENDED as set forth in Appendix B below.

99. IT IS FURTHER ORDERED that these Rules, as amended, shall be effective immediately upon publication in the Federal Register because they are either essentially procedural or relieve a restriction. *See* 5 U.S.C. § 553(d).

100. IT IS FURTHER ORDERED that the September 1, 1987, Petition for Interim Relief filed by Brown and Schwaninger IS DISMISSED.

101. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

Comments

1. Alpha Communications, Inc. (Alpha)
2. American Petroleum Institute (API)
3. American SMR Network Association, Inc. (ASNA)
4. Association of American Railroads (AAR)
5. Association of Maximum Service Telecasters (AMST)
6. Autotel Communications Network (Autotel)
7. Big Rock Communications Co.
8. Burtons Communications, Inc.
9. General Electric (GE)
10. International Mobile Machines Corp. (IMM)
11. Lavonne H. Cordon
12. Metrocom, Inc.
13. Metro Mobile Communications, Inc.
14. Motorola, Inc.
15. National Association of Business and Educational Radio (NABER)
16. National Mobile Radio Association (NMRA)
17. National Telecommunications and Information Administration (NTIA)
18. Special Industrial Radio Service Association, Inc. (SIRSA)
19. St. Louis Electronic Service Corp.
20. Utilities Telecommunications Council (UTC)
21. Zach Communications, Inc.

Replies

1. Alpha Communications, Inc. (Alpha)
2. Advanced Electronics Mobile Radio Communications (Advanced)
3. American Petroleum Institute (API)
4. American SMR Network Association (ASNA)
5. Association of Maximum Service Telecasters (AMST)
6. Atcomm, Inc.
7. Autotel Communications Network (Autotel)
8. Communication Services Associates, Inc. (CSA)
9. Fisher Communications
10. General Communications
11. Harris Communications
12. Mackeown and Associates
13. McGee Communications - Electronics, Inc. (McGee)
14. Morris Communications, Inc.
15. Motorola, Inc.
16. National Association of Business and Educational Radio (NABER)
17. National Mobile Radio Association (NMRA)
18. National Telecommunications and Information Administration (NTIA)
19. Patrick Electronics
20. Rayfield Communications
21. Resco, Inc.
22. Rowley Communications Corporation
23. Signal Technology, Inc.
24. Simmons Communications
25. Special Industrial Radio Service Association, Inc. (SIRSA)
26. V & L Enterprises

APPENDIX B

Part 90 of Chapter 1 of the Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303 unless otherwise noted.

2. 47 C.F.R. § 90.7 is amended by adding the following definition:

§ 90.7 Definitions

* * * * *

Specialized Mobile Radio Service. A radio service in which licensees provide land mobile communications services in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under this part, federal government entities, and individuals.

* * * * *

3. 47 C.F.R. § 90.179 is amended by revising the section heading and introductory paragraph to read as follows:

§ 90. 179 Shared use of radio stations in the frequency bands below 800 MHz.

Licensees of radio stations below 800 MHz authorized under this rule part may share the use of their facilities. A station is shared when persons not licensed for the station control the station for their own purposes pursuant to the licensee's authorization. Shared use of a radio station below 800 MHz may be either on a non-profit, cost-shared basis or on a for-profit private carrier basis. Shared use of an authorized station below 800 MHz is subject to the following conditions and limitations:

* * * * *

4. Subpart M (Sections 90.350 through 90.390) is removed in its entirety and the word "Reserved" substituted.

5. 47 C.F.R. § 90.601 is revised to read as follows:

§ 90. 601 Scope.

This subpart sets out the regulations governing the licensing and operations of all systems operating in the 806-824/851-869 MHz and 896-901/935-940 MHz bands. This subpart also governs the use of frequencies in the 806-821/851- 866 MHz bands along the Mexican and Canadian border areas in accordance with existing agreements. It includes eligibility requirements, application procedures, operational and technical standards for stations licensed in these bands. The rules in this subpart are to be read in conjunction with the applicable requirements contained elsewhere in this part; however, in case of conflict, the provisions of this subpart shall govern with respect to licensing and operation in these frequency bands.

6. 47 C.F.R. § 90.603 is amended by revising paragraph (c) to read as follows:

§ 90. 603 Eligibility.

* * * * *

(c) Any person, except wire line telephone common carriers, eligible under this part and proposing to provide on a commercial basis base station and ancillary facilities as a Specialized Mobile Radio System operator, for the use of individuals, federal government agencies and persons eligible for licensing under Subparts B, C, D, or E of this part.

7. 47 C.F.R. § 90.609 is amended by revising paragraph (c) to read as follows:

§ 90. 609 Special limitations on amendment of applications for assignment or transfer of authorizations for radio systems used to provide service to persons other than the licensee.

* * * * *

(c) Licensees of constructed systems are permitted to make partial assignments of an authorized grant to an applicant proposing to create a new system or to an existing licensee that has loaded its system to 70 mobiles per channel and is expanding that system. An applicant authorized to expand an existing system or to create a new system with channels it obtains through partial assignment will receive the assignor's existing license expiration date and loading deadline. A licensee that makes a partial assignment will not be authorized to obtain additional channels for that same system for a period of one year from the date of the partial assignment.

8. 47 C.F.R. § 90.611 is amended by revising paragraph (b), by adding a new paragraph (c), and by redesignating existing paragraphs (c), (d), and (e) as new paragraphs (d), (e), and (f) respectively to read as follows:

§ 90. 611 Processing of applications.

* * * * *

(b) All applications in pending status will be processed in the order in which they are received, determined by the date on which the application was received by the Commission in its Gettysburg, PA office, or the address set forth at 47 C.F.R. § 0.401(b) for applications requiring the fees established in Part 1, Subpart G of this chapter.

(c) Each application will be reviewed to determine whether it can be granted. Applications for channels in the Public Safety/Special Emergency, Industrial/ Land Transportation, and Business categories, as well as the 150 channels available for conventional use in § 90.615, must specify the intended frequency (or frequencies) of operation. Applications for channels in the SMRS category may either specify the intended frequency (or frequencies) of operation in accordance with the provisions of § 90.621 or request the Commission to perform the selection.

(d) Applications that can not be granted due to a lack of available channels in a particular area will be placed on a waiting list for that area. Waiting lists will consist of two groups. The first group will be comprised of applications from existing licensees who, in the area corresponding to the particular waiting list, operate trunked systems with 70 or more mobile units per channel. The second group will be comprised of applications to establish new systems or to obtain additional channels for conventional systems. Applications will be placed in the appropriate group according to filing dates, with the earliest date receiving the highest ranking. All applications in the first group will receive priority over any application in the second group regardless of filing date. When channels become available, the highest ranking application(s) will be granted based on the site specified and the Commission's mileage separation standards. Trunked systems that have had authorized channels cancelled due to failure to meet the loading requirements in § 90.631 will not be permitted on the waiting list for a period of 6 months from the date of the issuance of the superseding license.

* * * * *

9. 47 C.F.R. § 90.617 is amended by revising paragraph (d), amending Table 4A by revising the entry for Group No. 228 and adding new entries for Group Nos. 401-440, revising the heading for Table 4B and creating a new Table 4C to read as follows:

§ 90. 617 Frequencies in the 809. 750 - 816 / 854. 750 - 861 MHz, 821 - 824 / 866 - 869 MHz, and 896 - 901 / 935 - 940 MHz bands available for trunked or conventional system use in non - border areas.

* * * * *

(d) The channels listed in Tables 4A and 4B are available only for eligibles in the SMR category which consists of Specialized Mobile Radio (SMR) stations and eligible end users. This paragraph deals with the assignment of frequencies only in areas farther than 110 km (68.4 miles) from the U.S./Mexico border and farther than 140 km (87 miles) from the U.S./Canada border. *See* § 90.619 for the assignment of SMR frequencies in these border areas. For stations located within 70 miles of Chicago, channels 401-600 will be assigned in groups as outlined in Table 4C.

Table 4A - SMR Category 806 - 821 / 851 - 866 MHz Band Channels (280 channels)

Group No.	Channel Nos. * *
228	228-268-308-348-388
401	401-441-481-521-561
402	402-442-482-522-562
403	403-443-483-523-563
404	404-444-484-524-564
405	405-445-485-525-565
406	406-446-486-526-566
407	407-447-487-527-567
408	408-448-488-528-568
409	409-449-489-529-569
410	410-450-490-530-570
411	411-451-491-531-571
412	412-452-492-532-572
413	413-453-493-533-573
414	414-454-494-534-574
415	415-455-495-535-575
416	416-456-496-536-576
417	417-457-497-537-577
418	418-458-498-538-578
419	419-459-499-539-579
420	420-460-500-540-580
421	421-461-501-541-581
422	422-462-502-542-582
423	423-463-503-543-583
424	424-464-504-544-584
425	425-465-505-545-585
426	426-466-506-546-586
427	427-467-507-547-587
428	428-468-508-548-588
429	429-469-509-549-589
430	430-470-510-550-590
431	431-471-511-551-591
432	432-472-512-552-592
433	433-473-513-553-593
434	434-474-514-554-594
435	435-475-515-555-595
436	436-476-516-556-596
437	437-477-517-557-597
438	438-478-518-558-598
439	439-479-519-559-599
440	440-480-520-560-600

Table 4B - SMR Category 896 - 901 / 935 - 940 MHz Band

Channels (200 Channels) :

* * * * *

Table 4C SMR Category

Chicago Plan [2,3]

Group No.	Channel Nos.
401[1]	401 through 410
411	411-447-483-519-555
412	412-448-484-520-556
413	413-449-485-521-557
414	414-450-486-522-558
415	415-451-487-523-559
416	416-452-488-524-560
417	417-453-489-525-561
418	418-454-490-526-562
419	419-455-491-527-563
420	420-456-492-528-564
421	421-457-493-529-565
422	422-458-494-530-566
423	423-459-495-531-567
424	424-460-496-532-568
425	425-461-497-533-569
426	426-462-498-534-570
427	427-463-499-535-571
428	428-464-500-536-572
429	429-465-501-537-573
430	430-466-502-538-574
431	431-467-503-539-575
432	432-468-504-540-576
433	433-469-505-541-577
434	434-470-506-542-578
435	435-471-507-543-579
436	436-472-508-544-580
437	437-473-509-545-581
438	438-474-510-546-582
439	439-475-511-547-583
440	440-476-512-548-584
441	441-477-513-549-585
442	442-478-514-550-586
443	443-479-515-551-587
444	444-480-516-552-588
445	445-481-517-553-589

446	446-482-518-554-590
591	591-592-593-594-595
596	596-597-598-599-600

1 / Reserved for contiguous assignments or as a frequency pool for assignments to systems with odd number of channels.

2 / These frequencies will be authorized only in the area encompassed by a 70 mile radius centered at 41052§ 28" N, 87038§ 22" W.

3 / All stations located beyond the 70 mile distance authorized on or before August 16, 1982 to use these frequencies may continue to do so. Stations beyond the 70 mile distance authorized after August 16, 1982 shall employ frequencies listed in Table 4 subject to the provisions of § 90.621 (b) or (c) as applicable.

* * * * *

10. 47 C.F.R. § 90.627 is amended by revising paragraph (b)(2) to read as follows:

§ 90. 627 Limitation on the number of frequency pairs that may be assignable for trunked systems and on the number of trunked systems.

* * * * *

(b) * * *

(2) The licensee's existing trunked system is loaded to at least 70 mobile and control stations per channel; or,

* * * * *

11. 47 C.F.R. § 90.631 is amended by revising the section heading and paragraph (b); by adding new paragraphs (c) and (d); and by redesignating existing paragraphs (c), (d), (e), and (f) to new paragraphs (e), (f), (g), and (h), respectively, to read as follows:

§ 90. 631 Trunked systems loading, construction and authorization requirements.

(b) Each applicant for a trunked system shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. If at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for channels not loaded to 100 mobile stations per channel cancels automatically. All licensees who are authorized initially before June 1, 1993, and are within their original license term are subject to this condition. A licensee that has had authorized channels cancelled due to failure to meet the above loading requirements will not be authorized to obtain additional channels to expand that same system for a period of six month from the date of cancellation.

(c) Except as provided in (d) below, an applicant seeking to expand a trunked system by requesting additional channels from the Commission, or through intercategory sharing, or through an assignment must have a loading level of 70 mobiles per channel on the existing system that is the subject of the expansion request.

(d) In rural areas, a licensee of a trunked system may request to increase its system capacity by five more channels than it has constructed without meeting the loading requirements specified in (b) and (c) above. A rural area is defined for purposes of this section as being beyond a 100-mile radius of the designated centers of the following urbanized areas, as well as those areas that have a waiting list. (Rural areas may be different for 800 and 900 MHz channels since the Commission maintains separate waiting lists for these frequency bands.) The identified urbanized areas are: New York, NY; Los Angeles, CA; Chicago, IL; Philadelphia, PA; San Francisco, CA; Detroit, MI; Boston, MA; Houston, TX; Washington, DC; Dallas-Fort Worth, TX; Miami, FL; Cleveland, OH; St. Louis, MO; Atlanta, GA; Pittsburgh, PA; Baltimore, MD; Minneapolis-St. Paul, MN; Seattle, WA; San Diego, CA; and Tampa-St. Petersburg, FL. The coordinates for the centers of these areas are those referenced in § 90.477, except that the coordinates for Tampa-St. Petersburg are latitude 28000' 00" N, longitude 82027' 00" W. Where waiting lists determine whether an area is rural, the designated centers of those areas will be identified on the actual waiting lists released by the Commission. If a waiting list is later established in a rural area, licensees who have acquired additional channels pursuant to this paragraph will be subject to the automatic cancellation provisions in paragraph (b) above at the end of one year from the date the area first appears on a Commission waiting list, or at the end of their license term, whichever is longer.

* * * * *

12. 47 C.F.R. § 90.637 is amended by revising paragraph (a) as follows:

§ 90. 637 Restrictions on operational fixed stations.

(a) Except for control stations, operational fixed operations will not be authorized in the 806-824 MHz, 851-869 MHz, 896-901 MHz, or 935-940 MHz bands. This does not preclude secondary fixed tone signaling and alarm operations authorized in § 90.235 or in paragraph (c) of this section.

* * * * *

13. 47 C.F.R. § 90.655 is revised as follows:

§ 90. 655 Special licensing requirements for Specialized Mobile Radio systems.

All end users of conventional or trunked Special Mobile Radio systems must be licensed for any associated control points, control stations and mobile radio stations and only licensed end users are authorized to use those systems.

FOOTNOTES

[1] Notice of Proposed Rule Making, PR Docket No. 86-404, 1 FCC Rcd 809 (1986); Erratum, 1 FCC Rcd 1225 (1986). Additionally, *see* Order, PR Docket No. 86-404, 2 FCC Rcd 4294 (1987), which extended indefinitely the termination date for Subpart M (originally set to expire September 1, 1987). A list of commenters is contained in Appendix A.

[2] The term 800 MHz spectrum is used to refer to all spectrum in the 806-821 MHz and 851-866 MHz bands. The 896-901 MHz and 935-940 MHz bands are referred to as the 900 MHz band.

[3] *See* Notice of Proposed Rule Making and Notice of Inquiry, Docket No. 18262, 33 Fed. Reg. 10807 (July 17, 1968); First Report and Order and Second Notice of Inquiry, Docket No. 18262, 35 Fed. Reg. 8644 (June 4, 1970).

[4] *See* Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974); Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975); *aff§ d*, National Association of Regulatory Utility Commissioners v. FCC, 525 F. 2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). The remaining 45 megahertz was placed in reserve for later land mobile use.

[5] *See* Order, Docket No. 18262, 43 Fed. Reg. 35394 (August 9, 1978).

[6] *See* Second Report and Order, PR Docket No. 79-191, 90 FCC 2d 1281 (1982); 47 Fed. Reg. 41002 (September 16, 1982).

[7] *See* Second Report and Order, PR Docket No. 79-191, 90 FCC 2d at 1314-15 (1982); 47 C.F.R. §§ 90.350 and 90.601. The elimination of Subpart M and revision of Subpart S are the subject of this proceeding.

[8] We extended the September 1, 1987 deadline to allow additional time to analyze the comments and the issues surrounding this complex proceeding. *See* note 1, *supra*.

[9] H.R. Rep. No 765, 97th Cong., 2d Sess. 54.

[10] *See* 47 U.S.C. §§ 153 (gg), 332 (c)(1), and 332 (c)(2)

[11] NTIA Comments at 4-5.

[12] *Id.*

[13] NTIA comments at 5-6. *See also* Comments of LaVonne H. Cordon, 2.

[14] Reply Comments of Autotel at 4.

[15] *Id.* at 6.

[16] *See* Comments of Motorola at 18-19, Comments of ASNA at 29, Comments of GE at 3, Comments of NABER at 14.

[17] Motorola Comments at 18-20. *See* also NABER Comments at 14, API Comments at 16-21.

[18] NABER Comments at 17. NABER goes on to state, however, that it does not oppose inclusion of federal government entities as eligibles on SMR systems. 19*Id.*

[20] SIRSA Comments at 19-24; UTC Comments at 10-12.

[21] H.R. Rep. No. 765, 97th Cong. 2d. Sess. at 52, 54. *See also* Telocator Network of America v. FCC, *supra*.

[22] H.R. Rep. No. 765, 97th Cong. 2d Sess. at 54.

[23] Note that we are not, in this Order, generally expanding eligibility under Part 90 of our Rules; this action is limited to expansion of the pool of users eligible to use SMR services.

[24] The commenters opposed to the expansion of eligibility are UTC, ASNA, Motorola, NABER, SIRSA, GE, Metro Mobile, Big Rock, API and AMST. ASNA, Motorola, and NABER, however, favor granting waivers of eligibility for the federal government upon a proper showing.

[25] API Comments at 15.

[26] Big Rock Comments at 5.

[27] Comments of GE at 3-4.

[28] Comments of SIRSA at 18.

[29] *See , e. g.*, ASNA Comments at 29-32; NABER Comments at 13-14.

[30] The commenters in favor of expanding eligibility to the federal government are Advanced Electronics, Alpha Communications, Autotel, CSA, General Communications, Harris Communications, IMM, Lavonne Cordon, McGee Communications, Mackeown Associates, Morris Communications, NMRA, NTIA, Patrick Electronics, Rayfield Communications, V&L Enterprises, and Zach Communications. Those commenters in favor of expanding eligibility to individuals are Alpha Communications, Autotel, Lavonne Cordon, Morris Communications, NMRA, and NTIA.

[31] *See* Comments of Autotel at 11.

[32] *See* NTIA comments at 6-8.

[33] *See* Report and Order in PR Docket No. 86-160, 2 FCC Rcd 513 (1987), and 47 C.F.R. § 90.621(g).

[34] *See* Notice of Inquiry and Notice of Proposed Rule Making, Docket No. 20846, 41 Fed. Reg. 28540 (July 12, 1976); First Report and Order, Docket No. 20846, 69 FCC 2d 1831 (1978); Second Report and Order, Docket No. 20846, 89 FCC 2d 741 (1982); Memorandum Opinion and Order, Docket No. 20846, 48 Fed. Reg. 29512 (June 27, 1983); Notice of Proposed Rule Making, Docket No. 84-414, 49 Fed. Reg. 25,255 (June 20, 1984); Report and Order, Docket No. 84- 414, 50 Fed. Reg. 15,148 (April 17, 1985). 57 RR 2d 1409 (1985). *See also* Report and Order, Docket No. 86-335, 2 FCC Rcd 2379 (1987).

[35] *See* Notice, 1 FCC Rcd at 818.

[36] Federal government users may also provide their own service using government spectrum.

[37] There are four categories of channels under Subpart S: (1) public safety/special emergency, (2) industrial/land transportation, (3) business, and (4) SMRs. In addition, 150 channels governed by Subpart S are available to any Part 90 eligible for conventional use.

[38] The commenters that addressed this issue are AAR, API, NABER, SIRSA, and UTC.

[39] AAR Comments at 3.

[40] API Comments at 12-14; *See also* UTC Comments at 8-9.

[41] SIRSA Comments at 24-26.

[42] NABER Comments at 12.

[43] *See* 47 C.F.R. § 90.621(g)

[44] *See Notice*, 1 FCC Rcd at 814.

[45] We will grandfather indefinitely the few non-SMRs now licensed on these channels.

[46] *See Notice*, 1 FCC Rcd at 814-16.

[47] *See* Report and Order, PR Docket No. 85-6, 50 Fed. Reg. 32,419 (August 12, 1985), 58 RR 2d 1026 (1985).

[48] *See* Second Report and Order, Docket 79-191, 90 FCC 2d 1281 (1982), paras. 208 and 209; Memorandum Opinion and Order, Docket 79-191, 95 FCC 2d 477 (1983), para. 11.

[49] *See* Public Notice, Mimeo No. 1805, released January 16, 1986. For further discussion of the development of our processing and assignment procedures, *See Notice*, 1 FCC Rcd at 814-17. Our window and lottery procedures are explained in the Second Report and Order, Docket No. 79-191, 90 FCC 2d 1281 (1982).

[50] *See , e. g.*, Motorola Comments at 25-26.

[51] ASNA Comments at 23.

[52] *See , e. g.*, ASNA Comments at 23.

[53] *See , e. g.*, ASNA Comments at 23.

[54] Because frequencies in this pool are contained in separate tables for 800 MHz and 900 MHz channels, and systems are not interoperable (*i. e.*, one system cannot operate over both bands), separate waiting lists will be maintained for the two bands. Thus, with regard to preferences, for example, a fully-loaded 800 MHz system would be entitled to a preference on the 800 MHz waiting list only and a fully-loaded 900 MHz applicant would have a preference only on the 900 MHz list. We will allow applicants to maintain places on both waiting lists simultaneously. Action on one application will not affect the applicant's status or position on the other waiting list. Waiting lists for the 900 MHz channels will be established, if necessary, after the Commission begins to accept additional 900 MHz applications. *See* Public Notice, 1 FCC Rcd 543 (1986).

[55] *See* Public Notice, Mimeo No. 3570, at Section V.

[56] Because the services of coordinators are used in the non-SMR pools, the Commission has not established waiting lists in the assignment and processing of those channels.

[57] We will hold the lotteries that have been announced. We also will hold lotteries for the disposition of channels identified in previously released Public Notices, and will make grants pursuant to the current procedures governing these lotteries. We will not initiate new Public Notices following release of this Order, and, therefore, applicants not acquiring channels through the lotteries must apply for channels under the new waiting list procedures that will exist after the effective date of the Order. All channels recovered following adoption of this Order will be distributed under the new waiting list procedures.

[58] First Report and Order, Docket 18261, 23 FCC 2d 325 (1970); Second Report and Order, Docket 18261, 30 FCC 2d 221 (1971).

[59] Second Report and Order, Docket No. 18262, *supra*.

[60] Second Report and Order, Docket No. 79-191, 90 FCC 2d 1281 (1982). Memorandum Opinion and Order, Docket 79-191, 95 FCC 2d 477 (1983).

[61] 47 C.F.R. § 90.366(b).

[62] 47 C.F.R. § 90.631(d).

[63] 47 C.F.R. §§ 90.366(d) and 90.631(d). System capacity generally is defined as 100 mobile units or control stations per channel.

[64] 47 C.F.R. § 90.360(c).

[65] For a full discussion of the development of loading standards, *see Notice*, 1 FCC Rcd at 810-11.

[66] AAR Comments at 2.

[67] Atcomm Comments at 1.

[68] Commenters in favor of different loading standards for rural areas are UTC, ASNA, Motorola, NABER, SIRSA, Burtons Communications, Alpha Communications, St. Louis Electronics, Big Rock, Simmons Communications, Atcomm, General Communications, NMRA, and Autotel.

[69] ASNA Comments at 6.

[70] Motorola Reply Comments at i.-ii. *See also* NABER Comments at 8.

[71] SIRSA Comments at 15.

[72] Commenters in favor of retaining some form of loading standards are Alpha Communications, API, ASNA, Autotel, Big Rock, Burtons Communications, Cordon, Fisher Communications, GE, General Communications, Metrocom, Metro Mobile, Motorola, NABER, NMRA, NTIA, Simmons Communications, SIRSA, St. Louis Electronics, UTC, and Zach Communications.

[73] *See* ASNA Comments at 8.

[74] *See e. g.*, ASNA's Comments at 14 and 15.

[75] Motorola Comments at 6 (emphasis in original).

[76] SIRSA Comments at 9.

[77] *Id.* at 15.

[78] API Comments at 7; UTC Comments at 15.

[79] Metro Mobile and AAR favor using loading standards for preferences on expansion and intercategory sharing only. Those commenters in favor of using loading standards at least to award preferences for expansion or channels through interpool sharing are ASNA, Motorola, NABER, NMRA, SIRSA, Zach Communications, AAR, API, Alpha Communications, Cordon, and Fisher Communications.

[80] Due to limitations in our budget we have been forced to focus our enforcement efforts. We have chosen to implement active compliance programs for the SMR industry because of its spectrum consumption and because the vast majority of trunked systems are SMRs. We enforce the standards against other service categories as matters come to our attention through complaints. *See , e. g.*, Southern California Rapid Transit District (SCRTD), File No. 7110-17, letter of January 29, 1988, from Terry L. Fishel, Chief, Land Mobile Branch, Licensing Division to Jeremiah Courtney, Esquire; South Bay Regional Public Communications Authority, File No. 7320-04/L-2186, letter of November 20, 1987, from W. Riley Hollingsworth to Cappy Cross, Technical Services Manager.

[81] *See* Comments of ASNA at 18 and Comments of Motorola at 13.

[82] *See* Comments of ASNA at 15-16 and Comments of NABER at 10.

[83] These commenters are AAR, Alpha Communications, Autotel, Big Rock, Cordon, Fisher Communications, GE, General Communications, IMM, Metro Mobile, NMRA, St. Louis Electronics, and Zach Communications. NABER also concurred with this position in its comments, but amended its position in its replies to suggest that we retain a 3 year standard, but set it at 20 mobiles per channel.

[84] *See* Autotel Comments at 1-2; ASNA Comments at 15-16; NABER Comments at 9-10.

[85] ASNA Comments at 15-16.

[86] Autotel Comments at 3.

[87] Metro Mobile Comments at 1.

[88] NABER Comments at 6-11.

[89] We considered the option of choosing a new loading standard based on some other measurement of efficiency, as proposed by some commenters, but any of the standards proposed would be difficult to establish and monitor. Furthermore, we have used mobile loading standards since 1970 with positive results.

[90] Loading is now used to determine whether a conventional channel licensee is entitled to exclusive use of the channel. This proceeding is limited to trunked channels, for which all applicants receive exclusive assignments, and makes no change in the current uses of loading standards as they apply to conventional channels.

[91] A system will be subject to a channel recovery action if its loading deadline arrives at a time a filed application is pending and cannot be granted because all channels in the applicant's service category are already assigned. If the system does not have the requisite loading, the appropriate number of channels will cancel and the license will be superseded. Systems whose loading deadlines pass without the occurence of a channel recovery action will not be subsequently reviewed for compliance with the loading standards.

[92] *See* 47 C.F.R. §§ 90.360(c) and 90.366(c).

[93] *See* 47 C.F.R. § 90.621(g).

[94] Petition for Rule Making, RM-5153, in the Matter of Modification of FCC Rule Sections 90.364 and 90.627 Governing Trunked Specialized Mobile Radio Service System Requirements in Rural Markets, filed August 26, 1985.

[95] Pursuant to 47 C.F.R. § 90.151, applicants can, of course, request a waiver of the applicable rules.

[96] *See* para 56, *supra*.

[97] The nation's top twenty metropolitan areas include New York, Los Angeles, Chicago, Philadelphia, San Francisco, Detroit, Boston, Houston, Washington, D.C., Dallas-Fort Worth, Miami, Cleveland, St. Louis, Atlanta, Pittsburgh, Baltimore, Minneapolis-St. Paul, Seattle, San Diego, and Tampa-St. Petersburg.

[98] *See* the periodic Public Notice entitled "Private Radio 800 MHz Trunked Radio Systems Application Waiting List." The last Public Notice listed twenty areas on the waiting list: Atlanta, GA; Austin, TX; Boston, MA; Chicago, IL; Dallas-Fort Worth, TX; Denver, CO; Houston, TX; Los Angeles, CA; Miami, FL; Minneapolis, MN; New Orleans, LA; New York, NY; Northern California; Orlando, FL; Philadelphia, PA; Phoenix, AZ; St. Louis, MO; San Antonio, TX; Tampa, FL; and Washington, D.C. We note that only five of these twenty waiting list areas (Austin, Denver, New Orleans, Phoenix and San Antonio) are located outside the 100-mile radius of the top-20 cities listed in note 96.

[99] *See* para, 61, *supra*.

[100] *See* 47 C.F.R. §§ 90.358(c) and 90.609(c).

[101] *See* Second Report and Order, PR Docket No. 79-191, 90 FCC 2d at 1314 (1982).

[102] *See* Report and Order, Gen. Docket Nos. 84-1231 *et al.*, 61 RR 2d 165 (1986).

[103] Those commenters that addressed this issue are Autotel, NMRA, NABER, SIRSA, Metro Mobile, Zach Communications, Cordon, ASNA, and Motorola.

[104] *See* Motorola's reply Comments at 19-20; NABER's reply Comments at 8-9; and ASNA's comments at 27.

[105] *See* ASNA's reply Comments at 11.

[106] To illustrate, if the assignor's 5-channel SMR system has a loading deadline of March 15, 1988, and the 5 channels are assigned effective January 1, 1988, the assignee must assume the March 15 loading deadline and has only 75 days to load its new channels.

[107] *See* Autotel reply comments at 11-13.

[108] *See* Metro Mobile comments at 5. Existing rules contained in Subpart S address Metro Mobile's concern. In the case of a new conventional SMR system, 47 C.F.R. § 90.633(a) requires that the system be constructed and loaded within 8 months of grant. Further, 47 C.F.R. § 90.623 specifies that a conventional SMR cannot be granted an additional conventional channel unless its existing conventional channel(s) is (are) loaded to prescribed levels.

[109] The Commission already restricts licensees that have lost channels through our channel recovery program from placing applications on the Commission's waiting list within six months. 47 C.F.R. § 90.360(c) (1986). To maintain consistency with this policy, we will also preclude licensees that have lost channels though recovery actions from obtaining additional channels through intercategory sharing or assignment for six months.

[110] Big Rock Comments at 6.

[111] NTIA Comments at 11.

[112] NABER Comments at 21.

[113] Motorola Comments at 25.

[114] General Electric Comments at 7.

[115] NTIA Comments at 11.

[116] SMR licensees seeking to trade or exchange channels outside their category must also obtain approval from the appropriate frequency coodinator(s).

[117] *See* , *e. g.*, IBM Research and Development, Inc., released March 14, 1983, FCC 83-104, licensing a digital communications system that was designed to serve 1500 mobile/portable units per channel, and Advanced Train Control System, released January 24, 1988, 53 Fed. Reg. 3751 (Feb 9, 1988) granting applications from the Association of American Railroads to operate the Advanced Train Control System using six 900 MHz channels.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Amendment of Part 90, SubParts M and S, of the Commission's Rules.

I am concurring with the action taken by the majority regarding the amendment of Part 90, Subparts M and S of the Commission's rules. Although I believe that overall this item serves the public interest, I do have concerns not only with specific aspects of the amendment to Part 90 rules, but also with what the Report and Order fails to address.

I am concerned with the section of the amendments that allows partial assignment of channels. The amendments allow licensees to buy and sell channels while at the same time it also establishes a waiting list for available channels. The opportunity to buy and sell channels allows individuals to circumvent the waiting list process, and I am not sure such a free market process is in the public interest. Furthermore, the buying and selling of SMR channels suggests an "economic" means of managing spectrum that is inconsistent, in my opinion, with the intent of Congress. The legislative history of the 1982 Amendments of the Communications Act, states that the conferees intended to "specifically prohibit the Commission from employing auctions or similar economic methods in managing the private land mobile spectrum." *(See,* H.R. Rep. No. 765, 97th Cong., 2d Sess. 53 (1982.)) By creating both the waiting list approach and the economic means of obtaining channels, the Commission is creating a two-class system where those who can afford the additional cost of purchasing spectrum are pitted against those whose business plans cannot afford the added cost of bidding for spectrum. Finally, by allowing the buying and selling of channels, the chances of channels becoming available for waiting list applicants may be nonexistent. In this scenario, the Commission essentially has withdrawn itself from spectrum management -- an action that is blatantly inconsistent with Section 301 of the Communications Act.

I am also concurring to the amendment that allows individuals and the federal government to be end users. The amendment to Part 90 appears to undercut the "need for spectrum" rationale articulated in the Commission's allocation decision in General Docket Nos. 84-1231, 84-1233, and 84-1234; and runs counter to the rationale for UHF/Land Mobile sharing (General Docket No 85-172). In these proceedings, the majority argues that the need for additional spectrum for private land mobile radio services is based on the notion that the demand from *existing* users exceeds the available spectrum. Adding new categories of end users only exasperates the alleged demand for spectrum, making it more difficult and more costly for traditional SMR end users. The record in this proceeding fails to justify the inclusion of individuals and

the federal government as SMR end users. Another example of inconsistent Commission rationale can be found in General Docket 83-26, the creation of an additional Private Radio Service (57 R.R. 2d 559 (1984)). In this proceeding the Commission failed to allocate spectrum in the 900 MHz band for a low-cost personal radio communication service. In justifying its decision, the Commission argued that:

> ...the available spectrum at 900 MHz was insufficient to satisfy all existing requests, and the public interest required that the available spectrum be allocated to traditional private land mobile and cellular services and to a mobile satellite service. *(Ibid.)*

Furthermore, the Commission argued that:

> Since there has been substantial investment by the industry and public in the expectation that this land mobile reserve would be available to accommodate future land mobile growth, diversion of the reserve for other uses could significantly increase the cost of existing services to the American public. *(Ibid.* at 564)

By today's action, the Commission is doing what it opposed doing in the personal radio service -- allowing individuals eligibility status in the 800-900 MHz bands. If allowing individuals access to the 800-900 MHz reserve bands would have significantly increased the costs of existing land mobile radio services in 1984, then wouldn't that argument hold true in 1988? Although allowing individuals to be end users in the SMR service may serve an overall public interest, the amendment to Part 90 fails to provide sufficient evidence to refute the earlier Commission claim that such an action would increase the costs of traditional land mobile services. Once again I am bothered by the apparent inconsistency in logic used to formulate public policy.

Another concern I have focuses on the regulatory status of private carriers in light of changing end user eligibility. I believe that the private carrier status of SMR licensees could be in jeopardy by essentially gutting the distinction between private and common carrier services as specified by Congress in the 1982 Amendments to the Communications Act. In the 1982 Amendments Congress prohibited private land mobile licensees from reselling for profit interconnected common carrier services if private radio licensees wished to retain their private carrier status. The intent of such action, according to the legislative history of the 1982 Amendments, was to assure that ""frequencies allocated essentially for purposes of providing dispatch services are not significantly used to provide common carrier message service." *(See,* H.R. Conf. Rep. No. 765, 97th Cong., 2nd Sess. 56.) Common carrier status for SMR licensees was dismissed by Congress on the basis that the Part 90 eligibility requirement for end users was sufficient to remove the SMR licensee from the stigma of being a form of "public offering." *(See,* comments of General Electric Company at page 3.) In the 1982 Amendments to the Communications Act, Congress frequently refers to the "eligible users" of the private land mobile radio services. *(See,* 47 U.S.C. Section 153(gg) and Section 332(c)(1).) Even the legislative history accompanying the 1982 Amendments to the Act referenced the private land mobile radio licensee's option to offer their services or facilities to "eligible users." *(See,* H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 54.) By allowing individuals to become end users in the SMR service, the Commission may be altering significantly the dispatch nature of this service.

The intent of the 1982 Amendments to the Act was to clarify the distinction between private and common carriers. To the extent that the action in this proceeding removes from the category of "eligible users" everyone except foreign governments and their agents, the Commission may have crossed over the line devised by Congress to separate private from common carrier service. Furthermore, because SMR licensees can participate in intercategory sharing, federal government and individual end users who currently are not Part 90 eligibles will be eligible for channels in business and industrial/land transportation categories through exercising the option of intercategory sharing. In essence, the eligibility issues presented in this proceeding "bleeds" over into other service categories further blurring the distinction between private and common carrier service.

Allowing the federal government and individuals to be end users in the SMR service raises a fundamental economic issue. Assuming the demand for SMR services exists in the major urban areas[1] and given the fact that there is a finite amount of SMR spectrum, by allowing additional categories of end users access to this service we are increasing the cost of the service to existing SMR and other Part 90 private mobile radio users. Is today's action in the public interest when the possibility exists that federal government use of SMR services may increase traditional SMR service end users' costs?

The National Telecommunications and Information Agency (NTIA) argues that access to SMR frequencies is consistent with the federal government's privatization interests and could lead to more efficient federal spending and use of the spectrum. I agree with those who argue that it is arbitrary and capricious for the Commission to essentially reallocate part of the SMR spectrum to federal government users without a showing of need. Where is the need? The record in this proceeding does not establish a need to enlarge SMR end-user eligibility to include the federal government. It is ironic that in this proceeding a lack of record permits the *de facto* partial reallocation of SMR spectrum to the federal government, while the Commission labored over an extensive record of alleged need for SMR spectrum in the allocation proceeding in General Docket Nos. 84-1231, 84-1233 and 84-1234, and the UHF/Land Mobile proceeding (PR Docket No. 85-172). By allowing the federal government to be an SMR end user, the Commission may be contributing to the government's inefficient use of its own spectrum. Perhaps it would have been best to retain the existing policy of considering waivers regarding the federal government's access to SMR channels.

Another issue regarding the federal government's eligibility status centers on the fact that the government will now be able to compete, albeit indirectly, with private sector licensees and applicants in bidding for SMR channels under the partial assignment rules. Because the federal government cannot be a licensee in the SMR service it is unable to directly bid for SMR channels, however, there is nothing to prohibit the federal government from subsidizing a licensee's bid for spectrum. The net effect of

this scenario is the possibility that the government, as a player in the commercial market place, could drive up the purchase price of SMR channels.

I am pleased that the Commission has decided to maintain loading standards, however, I am concurring with the lessening of loading requirements for both channel reclamation and intercategory sharing. The loading standards have been useful in reclaiming channels in the 800 MHz bands. Under Subpart S licensees have to meet a 60 mobiles per channel use in three years and 80 mobiles per channel at five years or their channels will be reclaimed. They must also meet an 80 mobiles per channel use if they wish to seek additional channels through intercategory sharing. By lowering loading standards in major urban areas, the Commission is facilitating SMR access to channels in other categories. These "other" service categories may or may not be operating under the same market incentives as SMR licensees, and as a result of the lowering of loading requirements for intercategory sharing, the non-SMR categories of service may find their spectrum gone before they have the opportunity to develop their systems. Loading standards have been useful in reclaiming channels in the 800 MHz band. Due to the maturing of SMR services at 800 MHz, loading standards may not be as essential as they once were. Because we are now beginning SMR service in the new 900 MHz band, I would have preferred holding the loading standards, at least in the top urban areas, to those that are currently existing under Subpart S (60 mobiles at 3 years and 80 mobiles in 5 years).

While concurring with this item, the areas of partial assignments, eligibility and reducing loading requirements deserve special attention. We may be attempting to do exactly what Congress has prohibited the Commission from doing -- developing economic means of managing spectrum and possibly removing ourselves from spectrum management. Finally, by tampering with eligibility, the Commission may be setting the stage for new rounds of court actions attempting to distinguish private carriers from common carriers.

FOOTNOTE FOR STATEMENT

[1] The *Report and Order* in General Docket Numbers 84-1231; 84-1233; and 84-1234 (51 Fed. Reg. 37398 (October 22, 1986) at para. 41) allocated spectrum to private land mobile services based on the showing of need by existing services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend Section
97.113(d)(2) of the Commission's
Rules to Impose a Time Limit on
Information Bulletins.

ORDER

Adopted: March 8, 1988; Released: April 1, 1988

By the Chief, Private Radio Bureau:

1. On November 16, 1987, James M. Fisher of Ocala, Florida, filed a petition to amend Section 97.91(b) of the Commission's Rules, 47 C.F.R. § 97.91(b). The petition was corrected on January 21, 1988, to request amendment of Section 97.113(d)(2) of the Commission's Rules, 47 C.F.R. § 97.113(d)(2).

2. Section 97.113(a) of the Commission's Rules, 47 C.F.R. § 97.113(a), prohibits an amateur station from being used to engage in any form of broadcasting. Section 97.113(d)(2), however, states that one-way transmissions by an amateur station of information bulletins consisting solely of subject matter relating to amateur radio are not considered to be broadcasting. Mr. Fisher requests that that section be amended to limit such information bulletins to ten minutes of each twenty-four hour day.

3. In support of his petition, Mr. Fisher states that bulletins transmitted by certain amateur stations are causing congestion on the amateur service frequency bands. He believes that a time limit of ten minutes will keep the amateur service bands from becoming clogged with one-way information bulletin transmissions. He argues that there are ample print media devoted to amateur radio, including national magazines, tabloids and club bulletins.

4. The purpose of the amateur service is to provide for the self-training, intercommunication and technical investigations of authorized persons interested in radio technique solely with a personal aim and without pecuniary interest.[1] To bring about general agreement and common understanding as to what types of communications are proper in keeping with this purpose,[2] the Commission's Rules were amended in 1948 to specify that broadcasting was prohibited in the amateur service. The term "broadcasting" was defined as the dissemination of radio communications intended to be received by the public directly or by intermediary relay stations. Simultaneously, a rule was adopted that listed certain one-way communications by an amateur station that would not be considered broadcasting in the context of the prohibition.[3] Among these were information bulletins consisting solely of subject matter relating to amateur radio. Some 40 years later, these same provisions are embodied in current Section 97.113.

5. Information bulletin transmissions have served the amateur community by providing an effective means of keeping amateur operators informed about their service. For example, the club station of the American Radio Relay League Headquarters Operators Club, W1AW, transmits concise information bulletins at regular intervals several times each day using voice, telegraphy and teleprinting.[4] Amateur stations in practically every locality regularly transmit *Westlink*, a weekly capsule report of events in the amateur service prepared by a group of amateur operators. These and other similar transmissions do not occupy a set period of time. The duration of such transmissions depends upon the number and length of the information bulletins to be transmitted. While the transmission of some information bulletins may require ten minutes or less, other information bulletin transmissions may take considerably longer.

6. Mr. Fisher has not shown that the degree of congestion in the amateur service frequency bands caused by the transmission of information bulletins is sufficiently serious to warrant an enforced time limit on such transmissions. Nor has he shown that transmissions of information bulletins are of lesser importance than other types of permitted transmissions. To impose an arbitrary time limit of ten minutes per day would be an unnecessary restriction on a type of one-way transmission that helps keep amateur operators informed about their radio service.

7. The petition to amend Section 97.113(d)(2) to add a time limitation for information bulletins does not raise new or novel issues warranting consideration by the full Commission. Therefore, pursuant to the authority contained in Sections 0.331 and 1.401(e) of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.401(e), the petition IS DENIED. Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, review by the full Commission of this action, which is taken under delegated authority, may be requested.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] *See ITU Radio Regulations*, No. 53, (Geneva, 1979). *See also* 47 U.S.C. § 153(q).

[2] *See* Notice of Proposed Rule Making, Docket 8918, 13 Fed. Reg. 2027 (1948).

[3] *See* Order in Docket 8918, 13 Fed. Reg. 3207 (1948).

[4] The schedule for amateur station W1AW transmissions is listed on page 162, QST Magazine, January 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for waiver of certain radiotelephone requirements of Section 80.905(c) of the Rules for the U.S. passenger ship BRONWYN, call sign WSQ 7049.

ORDER

Adopted: March 18, 1988; Released: April 1, 1988

By the Chief, Private Radio Bureau:

1. In an undated letter, Mr. Edward S. Walters III of St. Thomas, Virgin Islands, requested that the radiotelephone installation requirements of Section 80.905(c) of the Commission's Rules, 47 C.F.R. § 80.905(c), be waived for the U.S. passenger ship BRONWYN, call sign WSQ 7049, 17 gross tons. Section 80.905(c) of the Rules requires that small passenger ships subject to Part III of Title III of the Communications Act of 1934, as amended, 47 U.S.C. §§ 381-386, must have a VHF radiotelephone installation or a remote unit located at each steering station. Auxiliary steering stations that are used only during brief periods for docking or for close-in maneuvers are exempted from these requirements. A single portable radiotelephone set can satisfy the VHF installation requirements if adequate permanent mounting arrangements with suitable power provisions and antenna feeds are installed at each operator steering station.

2. Mr. Walters stated that due to the small size and unique characteristics of the BRONWYN, the only steering station is exposed to the elements. As a result it is impractical to install a permanent mounting arrangement with suitable power provisions and antenna feed at the steering station. The Commission's San Juan field office has confirmed that all required radio equipment is installed in a cabin approximately 12 feet from the BRONWYN's steering station. Mr. Walters requested that in lieu of meeting the permanent mounting requirements in Section 80.905(c) the BRONWYN be allowed to use a portable VHF radio, enclosed in a waterproof plastic covering, located beside the helm. Additionally, a battery charging facility would be located with the ship's radio installation.

3. In view of the foregoing, it would be unreasonable and unnecessary to require the BRONWYN to comply with the permanent mounting requirements of Section 80.905(c) of the Commission's Rules. Accordingly, IT IS ORDERED, pursuant to Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, the requirements contained in Section 80.905(c) of the Commission's Rules for a permanently mounted VHF radiotelephone facility at the main steering station, ARE WAIVED for an indefinite period for the U.S. ship BRONWYN, call sign WSQ 7049, provided a portable VHF radio is located beside the helm. Further, the portable VHF radio must be protected by a waterproof covering and battery charging facilities must be located with the ship's permanent radio installation.

A copy of this Order must be retained with the BRONWYN's ship station records.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-275

In the matter of

Amendment of Part 80 of the rules
to designate VHF marine channel 13
for bridge-to-bridge communications
on the Great Lakes.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1988; Released: April 1, 1988

By the Commission:

1. This *Report and Order* amends Part 80 of the Commission's Rules to designate VHF marine channel 13 (156.650 MHz), rather than the currently used channel 16 (156.800 MHz), for vessel bridge-to-bridge (navigational) communications on the Great Lakes.

I. BACKGROUND

2. The Vessel Bridge-to-Bridge Radiotelephone Act (Bridge-to-Bridge Act)[1] requires that a means of communication be provided between operators of converging vessels to advise one another of their intentions. Under the provisions of the Bridge-to-Bridge Act, the Commission adopted rules designating channel 13 as the bridge-to-bridge channel and requiring subject vessels to maintain a continuous watch while being navigated. The Great Lakes were exempted from the terms of the Bridge-to-Bridge Act,[2] because under the Great Lakes Radio Agreement, [3] channel 16, the distress, safety and calling channel, is used for bridge-to-bridge communications, rather than channel 13. All ships equipped with VHF radio must maintain a listening watch on channel 16 when not being used for communications. The listening watch on channel 16 provides a common channel for safety communications as well as a common calling channel for initiating the exchange of traffic. Increasing congestion on channel 16 in the Great Lakes, however, has resulted in channel 16 becoming unreliable for bridge-to-bridge communications.

3. In the *Notice of Proposed Rule Making* in this proceeding[4] we noted that the commenters in PR Docket No. 84-1236[5] expressed an interest in designating channel 13 for bridge-to-bridge communications to improve maritime safety on the Great Lakes. Such action, however, was deferred pending negotiations with Canada. The U.S. Coast Guard (USCG) informally coordinated a proposal with the Canadian Coast Guard to move bridge-to-bridge communications on the Great Lakes from channel 16 to channel 13 to improve safety of life and property. We concurred with this view and, therefore, proposed to amend Section 80.308 of the Maritime Radio Services Rules, 47 C.F.R. § 80.308, to require that certain vessels subject to the Great Lakes Radio Agreement[6] maintain a listening watch on channel 13 for bridge-to-bridge communications and to delete rules that allow it to be used in the ship movement service.

4. Comments were filed by the Saint Lawrence Seaway Development Corporation (SLSDC), the Saint Lawrence Seaway Authority (SLSA), and the Lake Carriers' Association. Reply comments were filed by the USCG.

II. DISCUSSION

5. The Lake Carriers' Association fully supports the proposed change and suggests an implementation date of March 1, 1988, as the most beneficial due to the seasonal nature of navigation on the Great Lakes. Comments of Lake Carriers' Association at 1. Both the SLSDC and the SLSA generally support the proposal but oppose designating channel 13 for bridge-to-bridge communications within their Seaway vessel traffic system, which includes an area between Montreal, Canada, and Long Point, New York, on Lake Erie. They state that vessels transiting the Saint Lawrence Seaway are required by USCG regulations (33 C.F.R. §§ 401.60 - 401.65) to use certain assigned working frequencies while in a Seaway Traffic Control Sector. They argue that requiring channel 13 as a mandatory bridge-to-bridge frequency will cause confusion and create a potentially unsafe situation. Further, they object to removing rules that allow channel 13 to be used in the ship movement service as they currently use this as a working channel in certain sectors. They state that this would cause considerable interference thereby hampering their traffic control function and causing them considerable expense to modify their equipment to change frequencies. Thus the SLSDC and the SLSA recommend that they be exempt from mandatory monitoring of channel 13 as a bridge-to-bridge frequency and be allowed to continue using their working channels for bridge-to-bridge communications. *See* Comments of SLSDC at 3; Comments of SLSA at 2.

6. The USCG supports the proposed changes and finds the SLSDC and the SLSA's recommendations acceptable. Reply Comments at 3. The USCG noted that although we proposed to remove channel 13 from general use in the ship movement service on the Great Lakes, it would remain available for vessel control purposes in established vessel traffic systems, such as in the St. Lawrence Seaway. Reply Comments at 1. In negotiations between the USCG and the Canadian Coast Guard it was agreed that navigational safety would not be adversely affected if vessels transiting the Saint Lawrence Seaway were exempted from the mandatory bridge-to-bridge watch on channel 13 while under the control of the SLSDC and the SLSA. We agree with this recommendation and are amending our rules to designate channel 13 for bridge-to-bridge communications on the Great Lakes with an exemption for vessels in the Saint Lawrence Seaway that are subject to the Joint Regulations of the SLSA and the SLSDC.

7. As a result of negotiations between the U.S. and Canada, Canada is prepared to change its rules to move bridge-to-bridge communications on the Great Lakes from the heavily congested channel 16 to channel 13. Further, the Department of State plans to prepare a formal presentation to Canada to amend the Technical Regulations of the Great Lakes Radio Agreement. Because this is a safety service, it is of paramount importance that both

administrations make such a change effective at the same date and time. At present no date has been chosen. Therefore, while we are adopting the rule amendments as described, we will defer setting an effective date. After concurrence from Canada, the Chief, Private Radio Bureau shall issue an order under delegated authority to specify the effective date of the new rules.

8. The rule changes adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements and will not increase or decrease the burden hours imposed on the public.

9. We certify that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this rule making proceeding because the rule changes adopted herein will not have a significant economic impact on a substantial number of small entities. The changes adopted herein will have a beneficial effect on maritime safety in the Great Lakes by designating channel 13 in lieu of channel 16 for bridge-to-bridge navigational communications. There are three other channels available for ship movement communications, the current use of channel 13 on the Great Lakes.

10. A copy of this *Report and Order* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

III. CONCLUSION

11. For the reasons stated above IT IS ORDERED that under the authority contained in Sections 4(i) and 303(g) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(g) and (r), the Commission's Rules ARE ADOPTED as set forth in the Appendix below.

12. IT IS FURTHER ORDERED that after concurrence from Canada, the Chief, Private Radio Bureau acting under delegated authority shall issue an order establishing an effective date of the adopted rules.

13. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 80 -- Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609; 3 U.S.T. 3450, 3 U.S.T. 4726, 12 U.S.T. 2377, unless otherwise noted.

2. Section 80.308 is revised to read as follows:

§ 80.308 Watch required by the Great Lakes Radio Agreement.

(a) Each ship of the United States that is equipped with a radiotelephone station for compliance with the Great Lakes Radio Agreement must when underway keep a watch on:

(1) 156.800 MHz on board a vessel 20 meters (65 feet) and over in length, a vessel engaged in towing (*See* § 80.951(b)), or a vessel carrying more than 6 passengers for hire. This watch must be maintained whenever the station is not being used for authorized traffic. However, a watch on 156.800 MHz need not be maintained by a vessel maintaining a watch on the bridge-to-bridge frequency 156.650 MHz *and* participating in a Vessel Traffic Services (VTS) system and maintaining a watch on the specified VTS frequency.

(2) 156.650 MHz on board a vessel 38 meters (124 feet) and over in length, a vessel engaged in towing (*See* § 80.951(b)), or a vessel carrying more than six passengers for hire. This watch must be maintained continuously and effectively. Sequential monitoring is not sufficient. Portable VHF equipment may be used to meet this requirement. Vessels are exempted from this requirement while transiting the St. Lawrence Seaway and complying with the Joint Regulations of the St. Lawrence Seaway Authority and St. Lawrence Seaway Development Corporation between the lower exit of St. Lambert Lock at Montreal and Crossover Island, New York and in the Welland Canal and approaches between Calling in Point No. 15 and No. 16.

(b) The watch must be maintained by the master, or person designated by the master, who may perform other duties provided they do not interfere with the effectiveness of the watch.

3. In Section 80.373, footnote 6 of paragraph (f) is revised to delete the description of frequency usage in the Great Lakes, to read as follows:

§ 80.373 Private communications frequencies.

* * * * *

(f) * * *

6 On the Great Lakes, in addition to bridge-to-bridge communications, 156.650 MHz is available for vessel control purposes in established vessel traffic systems. 156.650 MHz is not available for use in the Mississippi River from South Pass Lighted Whistle Buoy "2" and Southwest Pass

entrance Midchannel Lighted Whistle Buoy to mile 242.4 above Head of Passes near Baton Rouge. Additionally it is not available for use in the Mississippi River-Gulf Outlet, the Mississippi River-Gulf Outlet Canal, and the Inner Harbor Navigational Canal, except to aid the transition from these areas.

* * * * *

4. In Section 80.956, paragraph (b)(1) is amended by removing the words "Channel 13 - 156.650 MHz", a new paragraph (b)(2) is added to read as follows and the remaining paragraphs are renumbered (b)(3) and (b)(4) to read as follows:

§ 80.956 Required frequencies and uses.

* * * * *

(b) * * *

(2) The navigational bridge-to-bridge frequency, 156.650 MHz (channel 13).

* * * * *

FOOTNOTES

[1] 33 U.S.C. §§ 1201-1210.

[2] *See* 33 U.S.C. § 1207 and 33 C.F.R. § 26.109.

[3] Agreement Between the United States of America and Canada for Promotion of Safety on the Great Lakes by Means of Radio, 1973, T.I.A.S. 7837, amended T.I.A.S. 9352 (Great Lakes Radio Agreement).

[4] 2 FCC Rcd 5170 (1987).

[5] Report and Order, 50 Fed. Reg. 16500 (1985).

[6] The Great Lakes Radio Agreement applies to vessels 65 feet and over in length, tow boats, and vessels carrying more than six passengers for hire. *See* 47 C.F.R. § 80.951. Only vessels 124 feet and over in length, tow boats and vessels carrying more than six passengers for hire would be required to maintain the bridge-to-bridge watch on channel 13, all others would still be required to maintain the safety watch on channel 16.

[7] 2 FCC Rcd 5171, *See* 47 C.F.R. §§ 80.373 and 80.956.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition of the

SANYO MANUFACTURING CORPORATION

For Waiver of Part 15 of the
Commission's Rules to Allow the
Manufacture and Marketing of the
Specific Signal Display Device

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 1988; Released: April 1, 1988

By the Commission: Commissioner Quello and Commissioner Dennis concurring and issuing statements.

1. Last year, the United States Court of Appeals for the District of Columbia Circuit remanded to the Commission the record in *Association of Maximum Service Telecasters v. FCC*, 791 F.2d 207 (1986). The case concerned a Commission decision that certain video display devices to be marketed by Sanyo Manufacturing Corporation which receive only one or two television channel frequencies are not subject to our all-channel receiver rules, 47 C.F.R. § 15.65 *et seq*. *See Limited Reception Television Receiver*, 56 RR 2d 681 (1984), recon. denied, *Sanyo Manufacturing Corp.*, 58 RR 2d 719 (1985). Because of some confusion in the record concerning the scope of the Commission's decision, the court remanded for an explanation of: (1) what effect the FCC intended its Sanyo ruling to have on other similar products, consistent with the Commission's obligations under the Administrative Procedure Act; (2) the nature and status of a separate proceeding regarding a security surveillance device; and (3) the relationship of the latter proceeding, if any, to the Sanyo decision. *Association of Maximum Service Telecasters*, 791 F.2d at 209.

2. A brief summary of the history of this proceeding will put the court's questions into perspective. This proceeding commenced with a request from Sanyo for a waiver of the Commission's all-channel receiver requirements contained in 47 C.F.R. § 15.65 *et seq*. Those rules were promulgated pursuant to section 303(s) of the Communications Act, which permits but does not require the Commission to enact rules requiring an apparatus designed to receive television pictures to be capable of adequately receiving all television frequencies.

3. Cable systems and electronic devices feed information to television receivers over VHF channels 3 or 4 because, as adjacent channels, both cannot be used for over-the-air transmission in the same area without creating interference. Thus, one of these two channels is generally unused in any given area. Monitoring devices that are intended only to be used in conjunction with cable service or electronic devices, therefore, need to be capable of receiving only these two channels.

4. Sanyo intended to market a monitoring device that could be used with cable television systems or as a video display device for personal computers, video tape recorders (VCRs), TV games, and similar electronic devices. Because all the Sanyo devices would be manufactured to feed a video image by a coaxial cable over either television channels 3 or 4, they would receive television channels 3 and 4 if connected to an antenna but would not receive any other VHF or UHF channels. The Sanyo device was not marketed with an antenna. Numerous parties commented on Sanyo's waiver request.

5. We concluded that in light of the device's intended purpose, "the mere fact that Sanyo's device will incidentally accept the signals of 2 VHF frequencies does not make it a television receiver' subject to our All Channel requirements." *Limited Reception Television Receiver*, 56 RR 2d at 683 ¶ 8. We indicated that our holding would apply to all similar receivers. *Id*. Because the all-channel rules did not apply, a waiver was unnecessary. On reconsideration, we disposed of numerous new and old issues raised by petitioners and generally affirmed our holding below. However, whereas our initial decision had stated that our ruling would apply to any other device like Sanyo's, at one point in the reconsideration order we suggested that we were analyzing only the statutory and regulatory status of Sanyo's particular product. *Sanyo Manufacturing Corp.*, 58 RR 2d at 723 ¶ 14.

6. Initially, the court requested that we address this seeming contradiction in our decisions and clarify the actual scope of our ruling.[1] We reaffirm that our intention was, as we stated in the initial decision, for our holding "to apply narrowly to *the types of receivers in question here* – a two channel receiver, marketed without an antenna and not intended to receive over-the-air broadcast signals." *Limited Reception Television Receiver*, 56 RR 2d at 683 ¶ 9 (emphasis added). In other words, we intended to exclude from the application of our all-channel rules all monitoring devices of this character, regardless of who the manufacturer might be. Despite some language suggesting a narrower holding on reconsideration, we did not intend to limit our decision to Sanyo's particular device. In addition, because our decision was in the nature of a declaratory ruling, designed to remove uncertainty concerning the applicability of our all-channel rules, the APA's notice and comment procedures, 5 U.S.C. § 553, did not apply. 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; see *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

7. The court also asked us to address the nature and status of another authorization proceeding, as well as its relation to the Sanyo proceeding. On June 11, 1985, NAP Consumer Electronics Corporation (NAP) requested the grant of an equipment authorization for a security observation system that is very similar to Sanyo's interface device. On June 27, 1985, the Commission's Office of Engineering and Technology granted the application. FCC File No. 31010/EQU 4-3-4. (The FCC ID numbers for NAP's camera and monitor are BOU9Q2CS01 and BOU9Q2SS01, respectively). Althouth NAP will be the grantee, Philips Video Products (Taiwan) Ltd. will manufacture the product. The product will be marketed under both the Sears and Magnavox brand names. The security observation system will consist of one or more cameras and a monitor or display device. The cameras transmit their pictures to the display device over either TV channel 3 or via a 75 ohm cable. The display device receives the cameras' video transmissions on either TV channel 3 or 4 and displays the picture. The Sears owner's manual for this system also indicates that the camera has a built-in

microphone for audio reception. No antenna will be included. In response to the court's query, we note that any actions taken on equipment authorization applications, like any other action taken on delegated authority, may be appealed to the full Commission within 30 days of public notice. *See* 47 C.F.R. § 2.923.

8. The NAP authorization does not mention the prior Sanyo determination. Nonetheless, the description of the NAP security device illustrates its fundamental similarity to Sanyo's device. Both the NAP and Sanyo devices are interface or display devices designed to receive signals only on those frequencies operating on VHF TV channels 3 and 4. Neither was designed for off-the-air reception; indeed, both devices were to be sold without antennas. Although a separate VCR, TV game device, or cable service must be purchased for operation with Sanyo's display device, NAP's display device is to be sold with a camera that transmits video images via cable over channels 3 and 4. According to the Sears manual, NAP's monitor, like Sanyo's, can also be wired through a VCR recorder or an ordinary television set. Thus, the two pieces of equipment are very similar. In any event, the few differences that exist between the two monitors are unrelated to the guiding principles set forth in the Sanyo ruling, and we intended the NAP authorization to follow the Sanyo precedent.

9. In short, we intended our ruling in *Limited Reception Television Receiver* to apply to all monitoring devices resembling Sanyo's device, including a device like NAP's. The Office of Engineering and Technology has already authorized similar equipment based upon that decision. We believe that our elaboration here should eliminate any confusion that our orders may have engendered.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTE

[1] As evidence of this apparent confusion, the court also quoted from our reconsideration order that "[o]ur opinion is said to fail to set forth enunciated standards for determining the legality of other, but not identical, products." *Sanyo Manufacturing Corp.*, 58 RR 2d at 723 ¶ 14. This statement, however, did not represent a holding by this Commission, rather it was merely a summarization of one commenter's argument.

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Sanyo Manufacturing Corporation's Requested Waiver of Part 15 of the Commission's Rules.

The specific issue before the Commission on remand is to clarify the intent of its previous decision in this proceeding. While I was not part of the majority in the initial deciaion, it appears the Commission majority intended the decision to have broad applicability and not be limited to Sanyo. *Association of Maximum Service Telecasters v. F.C.C.*, 791 F.2d 207, 209 (D.C. Cir. 1986). Therefore, I will concur with the decision herein to this very limited extent.

I remain convinced, however, that the Commission's interpretation of the statute ia simply wrong. Section 303(a) states that the Commisaion shall:

> Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission....[emphasis supplied] *Id.*

The Commission has used this language to define a television broadcast receiver. 47 C.F.R. § 15.4(g) (1986). Consistent with the statute, the Commission has adopted rules requiring that television receivers be capable of receiving all channels allocated by the Commission to the television broadcast service. 47C.F.R. §15.65(a)(1986).

Unfortunately, the Commission continues to rewrite the statute without the benefit of the legislative process. Under the Commission's definition, the Act would apply only to devices that were intended to be television receivers. The Commission's desire to delete the word designed and replace it with the word intend finds no support in the plain meaning of the statute or the legislative history. *See* S. Rep. No. 1526, 87th Cong., 2d Sess. 2-3 (1962).

As a matter of policy, the Commission's interpretation of the statute makes little sense. The majority's position forces the Commission into a posture where it must determine the state of mind, *i.e.*, "intent" of the manufacturer in order to determine the applicability of the Act. Such an approach requires a significant degree of administrative clairvoyance. For example, should the Commission place primary reliance on an inventor's specifications or the marketing department's sales literature? The decision provides little guidance on this point. The problems with determining a manufacturer's "intent" are obvious and could lead to wholesale circumvention of the statute.

Concern over the potential for circumvention of the statute is exacerbated given the recent demise of our must carry rules. The initial decision in this proceeding relied on the Commission's former must carry rules when addressing concerns over the ability to receive local broadcast signals. *Limited Reception TV Receiver*, FCC 84-261, 56 R.R.2d 681, 683 (1984). In fact, the Commission admitted that the spirit of the All Channel Receiver Act may be invoked where a cable system does not carry a UHF station that is otherwise receivable over-the- air. *Id.* Given the elimination of our must carry rules, see *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir. 1988), the Commission should carefully scrutinize the manufacture of television receivers that do not provide access to all local over-the-air television broadcast signals.

In its decision adopting the now defunct interim must carry rules, the Commission found that some cable systems had ceased to carry local broadcast stations. *See Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864 at ¶ 131 (1986). The Commission's long term solution to this problem was to ensure that cable subscribers would have independent access to all local over-the-air television broadcast signals. To this end, the Commission promoted the use of an input selec-

tor device (A/B switch) which allows cable subscribers to maintain access to over-the-air television broadcast signals. Moreover, a consumer education program was implemented to advise consumers of the necessity to retain over-the-air reception capability.

It is difficult to imagine how the Commission can find that the public interest requires a regulatory scheme promoting access to all local over-the-air broadcast signals and at the same time allow the manufacture of television receivers capable of receiving only two channels. Such inconsistency appears to be rather arbitrary.

In summary, I am convinced that the decision conflicts with the express provisions of the All Channel Receiver Act. Given the absence of must carry rules, I am particularly concerned with the potential harm to the public that may result from the manufacture of limited channel receivers. To the extent the Commission's decision contemplates the approval of similar receivers in the future, the problem will surely increase. Becauae of the potential harm to the public and conflicting policies, the Commission should have solicited public comment before rushing to judgment in this matter. Therefore, I will concur on the narrow ground stated above.

CONCURRING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Sanyo Manufacturing Corporation, Petition for Waiver of Part 15 of the Commission's Rules to Allow the Manufacture and Marketing of the Specific Signal Display Device

I take no position as to whether the Commission's interpretation of the scope of the Commission's rule 15.65 enacted pursuant to the All Channels Receiver Act of 1962 is appropriate or correct. *See Amendment - of - Part - 15 - of - the Commission's Rules to provide for Operation of a Limited Reception-TV-Receiver,* 56 R.R. 2d 681 (1984). I do recognize, however, that the Commission's earlier decision does have practical effects beyond the specific Sanyo device originally at issue. Thus, I believe that the question before the Court in *Association - of - Maximum - Service - Telecasters* v. *FCC,* 791 F. 2d 207 (D.C. Cir. 1986) is not moot, and I urge the Court to decide the instant case to provide guidance to manufacturers as to the scope of the rule in dispute.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-143

In re Applications of

LINDA CROOK — File No. BPH-850228MD
Quincy, Illinois

CYNTHIA ESCAJEDA CART — File No. BPH-850528MC
Quincy, Illinois

For Construction Permit for a
New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1988; Released: April 1, 1988

By the Review Board: BLUMENTHAL and ESBENSEN; Board Chairman MARINO absent.

1. The Board has before it a Petition for Reconsideration of our *Decision*, 3 FCC Rcd 354 (Rev. Bd. 1988), in the above-styled proceeding filed by Linda Crook (Crook) on February 25, 1988, as well as a cross-referenced Motion to Enlarge Issues filed by her on that same date. Oppositions to both the Crook petition and her coordinate motion were filed on March 9, 1988 by Cynthia Escajeda Cart (Cart). [1] These pleadings follow our *Decision* in which the mutually exclusive application of Cart prevailed over the competing application of Crook for a new FM radio facility in Quincy, Illinois. For reasons that follow, we shall grant Crook's petition and her motion.

2. One of the acceptable grounds for entertaining a petition for reconsideration is that it relies upon newly discovered evidence, *see* 47 CFR § 1.106(c), and "that consideration of the facts relied on is in the public interest." *Id.*, at § 1.106(c)(2). *See generally Southeast Arkansas Radio, Inc.*, 61 FCC 2d 72 (1976); *KFPW Broadcasting Co.*, 44 FCC 2d 310, 311 (1973). The Crook petition, as will be seen, meets those two requirements. That is because, in her motion to enlarge, Crook submits documentary evidence which raises significant questions as to whether Cart actually was, as claimed, the sole proprietor of the applicant entity bearing her name in this proceeding. Additionally, the same documentary evidence raises other serious questions pertaining to Cart's basic qualifications.

3. Cart principally received her grant from the Board based upon her representation that she was entitled to a 100% quantitative "integration" factor (enhanced by collateral attributes) as the proposed solitary principal of her applicant entity. *See Initial Decision*, 2 FCC Rcd 3511 (1987) (Chachkin, ALJ). The Board's subsequent *Decision* accepted these Cart representations, just as did the ALJ. However, Crook has appended to her instant pleadings several documents that bear directly upon Cart's representation that she was, and intended in the future to be, the sole proprietor of the subject broadcast station.

4. One appendage to her petition is a February 19, 1988, affidavit of Thomas M. Jones, a Commission broadcast licensee,[2] in which Jones describes in considerable detail: (1) his initial introduction to Cart (and her husband, Robert Cart); (2) their offer to Jones of a 33% partnership interest in Cart's Quincy application; (3) Jones' subsequent trip in the fall of 1986 to Quincy to canvass the market on behalf of the Carts and himself; and (4) Jones' clear understanding that a third party, Rick Murphy, would also own a 33% interest in the proposed Cart operation. Jones further avers that "[a]t that time, I did not know that Cynthia [Cart] had represented to the FCC that she intended to be the sole owner of the station."[3] Moreover, although Cart has throughout represented that she would personally relocate her domicile to Quincy (a community which Cynthia Cart had never yet visited) to manage her proposed station, *Initial Decision*, 2 FCC Rcd at 3515, the Jones' affidavit submitted by Crook declares (at 3-4):

> During my discussions with Cynthia Cart, after my trip to Quincy, I raised the issue of whether she would be moving to Quincy to manage the station. She responded that she did not care to live in Quincy and preferred to remain in her home in Prescott, Arizona, where her husband had a business and her two daughters attended school. At this time or shortly thereafter, Cart and Murphy discussed with me the idea of renting an apartment in Quincy in Cynthia's name and possibly registering a car there, in order to create the appearance of residency. However, it was clearly understood that Cart would remain in Prescott, Arizona. Indeed, it was never clear to me who would actually manage the station if it was built, since Cart and Murphy both had commitments in Arizona and I had no intention of doing it myself.

5. The Jones allegations would appear to be buttressed by two other documents appended to the instant Crook pleadings. First is a memorandum of November 5, 1986 from Jones to Cart in which Jones reports back to the Carts on his personal trip to Quincy. That memorandum describes the general commercial market, surveys the existing media line-up, outlines for the Carts the steps necessary to secure the Construction Permit, and suggests the establishment of an organized broadcast business plan.[4] The second document is a letter of January 6, 1987 from Cynthia Cart to Jones in which Cart relates that she is "excited about their potential partnership" and advises Jones that "I now must ask that you furnish the $30,000... that we discussed in order to pay communications counsel, lest Cart be compelled to "pursue the other people that have shown an interest. [5] In closing that January 1987 letter, Cart wrote that "I know that you would prefer to have a construction permit in hand prior to spending any money," but continues that she might, as a last resort, have to secure her own mother's participation in "the deal".

6. The Cart opposition pleadings do not address substantively the Jones allegations or the implications of the other two appendant documents. Rather, they seek to rely upon

purported procedural infirmities in both the Crook petition and the associated motion. However, even if we agreed with Cart's procedural arguments (which we do not), we note that Crook has represented that she is appearing *pro se*, and the Board has often reprised that in applying procedural rules we do not necessarily lose sight of the fact the transcendent purpose of our administrative proceedings is to do justice to the parties and to the larger public interest. *Son Broadcasting, Inc.*, 92 FCC 2d 450, 452 (Rev. Bd. 1982); *see also* 47 CFR § 1.106(c)(2) (public interest justifies reconsideration of decisional facts). Under the facts present here, we cannot, and would not, summarily brush aside the serious allegations contained in Crook's pleadings (and accompanying documentation) without considering the substantive matters alleged, allegations completely unchallenged on the merits in Cart's responsive pleadings.[6]

7. Although there is no indication in the material submitted by Crook that a partnership between Cart and Jones (and/or Rick Murphy) was ever formally consummated, or that Jones ever responded to Cart's January 1987 solicitation of his $30,000 financial contribution, we nonetheless find that the evidence does raise several critical questions that must be resolved before we can determine that Cart did not fundamentally misrepresent her status in these proceedings. For example, we believe that it is necessary to explore further Jones' direct allegation that Cart harbored no intention to move to Quincy, a community she had never even visited at the time of the hearing, to manage her station, but that she always intended to remain in Arizona.[7] Next, we believe that Cart's January 1987 letter to Jones strongly suggests that Cart, at least, considered her partnership with Jones to be a *fait accompli*. That letter further appears to reflect, at a minimum, Cart's view that she and Jones had gone even so far as to agree upon a specific sum ($30,000) for Jones' partnership interest, and that Cart considered the money actually due and owing in consideration for Jones' 33% equity interest.[8] Finally, insofar as it appears that Cart was, in January 1987, relying heavily upon Jones' financial contribution "out of necessity", or an equivalent sum from "other people that have shown an interest" (including, mayhaps, Cart's mother), we believe that we must inquire further into Cart's certification of her financial qualifications, with a particular focus on the question of whether Cart's certification was originally premised upon the anticipated investment of Jones (or Murphy or investor substitutes for them). Also in this regard, a full disclosure of Cynthia Cart's financial status, as of the date of the execution of her application, is necessary.

8. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration and the motion to enlarge filed February 25, 1988, respectively, by Linda Crook ARE GRANTED to the extent indicated herein; and that the pleadings filed March 17, 1988 by Linda Crook ARE DISMISSED; and

9. IT IS FURTHER ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for adduction of evidence on the following issues and the issuance of a *Supplemental Initial Decision* :

(1) To determine whether Cynthia Cart was lacking in candor and/or misrepresented facts respecting her ownership status and integration proposal; and if so, the effect of such conduct upon her basic qualifications to be a Commission licensee; and

(2) To determine whether Cynthia Cart engaged in misrepresentation and/or lack of candor in certifying that she was financially qualified to construct and operate her proposed station; and if so, the effect of such conduct on her basic qualifications to be a Commission licensee; and

10. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence on the above issues SHALL BE on Linda Crook and the burden of proof SHALL BE on Cynthia Cart.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] On March 17, 1988, Crook filed several additional pleadings with the Board. In view of our disposition herein, these additional pleadings will be dismissed as moot.

[2] The February 19, 1988 affidavit of Thomas W. Jones (Attachment 2, Crook Petition for Reconsideration) declares:

> By way of background, I have been a minority or majority owner of several radio broadcasting stations at various times since 1968, including WQTE, Monroe, Michigan; KBON-FM, Lake Arrowhead, California; KDIG(AM), San Bernardino, California; and KKON(AM) and KOAS-FM, Kealakekua, Hawaii. I am currently a part owner of KBAS (AM), Bullhead City, Arizona, and KWAZ-FM, Needles, California.

[3] *Id.*, at 3.

[4] Attachment 2, Exhibit A, Crook Petition for Reconsideration (Memorandum of November 5, 1986 from Thomas M. Jones to Cynthia and Robert Cart).

[5] *Id.*, Exhibit B, the whole of which reads as follows:

> January 6, 1987
> Mr. Tom Jones
> 2586 Holkham
> Charlottsville, Virginia 22901
>
> Dear Tom,
>
> A significant amount of time has transpired for you to investigate the investment opportunity I presented you with in Quincy, Illinois.
>
> After our first meeting, I was excited about the potential partnership that we discussed, primarily because of your broadcast experience and your financial strength. Both Bob and I felt very comfortable with you.
>
> The time has come when I MUST pay Bob Olender for his professional services. The December 22nd hearing went very well. Judge Chachkin indicated he would drop the transmitter site issue and even set the dates for proposed findings of fact.

I now must ask that you furnish the $30,000 in that we discussed or out of necessity, I must pursue the other people that have shown an interest. It's hard for me to believe but my mother is even considering the deal.

I know that you would prefer to have a construction permit in hand prior to spending any money. If I had the CP, I probably would not need the money. Please contact me and inform me of your intentions.

Sincerely,

Cynthia Cart

P.S. Please return my transcript and direct case. I will need them to continue.

[6] In its Opposition to Crook's motion, Cart requests that "[s]hould the Board not agree with Cart's analysis, it is respectfully requested that the Board afford Cart the normal time prescribed by Section 1.229 to respond substantively to Cart's petition." *Id.*, at 2 n.3. In view of the nature of the evidence submitted by Crook, we believe that no purpose would be served by additional pleadings and that both the Jones allegations and any conceivable Cart response would inevitably require "first-hand testing in the laboratory of truth." *California Broadcasting Corp.*, 98 FCC 2d 994, 1001 (Rev. Bd. 1984) (remanding disputed facts to ALJ for further hearing).

[7] It appears from the *Initial Decision* that the ALJ, too, was somewhat uneasy about Cart's purported "integration" intentions. *See* 2 FCC Rcd at 3515, where the ALJ stated:

> With respect to local residence, Ms. Cart, a resident of Prescott, Arizona, has never lived in or visited the Quincy area. Ms. Cart has no particular interest in Quincy, Illinois. Ms. Cart is interested in owning a radio station. "I don't care where it is" (Tr. 225-226). Under the rubric of best practicable service, Ms. Cart's attitude does not portend a service designed to meet the needs and interests of the Quincy area.

[8] We are also not incurious as to the reasons that Jones, a Commission broadcast licensee, waited until this late moment to upset the Cart, as it were. For, as we understand the purport of his affidavit, Jones unavoidably suggests prior knowledge that Cart may have misrepresented her status as an individual applicant, and her "integration" intentions, when he has apparently been aware of potentially conflicting facts for several years. For instance, Cart's January 1987 letter to Jones asks his return of the hearing transcript and Cart's direct case submission. *See supra* note 5. In the remand hearing ordered herein, we expect Jones to participate fully as a material witness, and to exhibit the *absolute* candor demanded of a Commission broadcast licensee.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-109

In re Applications of

MARK L. WODLINGER File No. BPCT-851120KH

BHC ASSOCIATES, LIMITED PARTNERSHIP File No. BPCT-860110KG

Richard J. Fox d/b/a COMANCHE ENTERPRISES File No. BPCT-86110KK

For Construction Permit for a
New Television Station
Billings, Montana

ORDER

Adopted: March 22, 1988; Released: April 1, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Board has before it a petition for reconsideration of its order memorializing the Board's *pro forma* dismissal of Comanche's application in the above-styled proceeding.[1]

2. The Board has reviewed Comanche's petition and finds that nothing contained therein meets the Commissions standards for reconsideration. *See* 47 CFR § 1.106. Insofar as Comanche's petition intimates that, after voting to formally dismiss Comanche's application, the Board's conference in chambers following oral argument to discuss a potential settlement with the two remaining applicants constituted an *ex parte* communication, we find its suggestion frivolous. Counsel for Comanche was personally advised prior to that conference that the Board had voted to dismiss Comanche's application. *See* Tr. of Oral Arg. of Feb. 16, 1988 at 696-698.

3. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration and reinstatement of application filed March 18, 1988 by Comanche Enterprises IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] The Board's dismissal order, FCC 88R-6, released February 16, 1988, explains that Comanche was disqualified by the ALJ, and that Comanche did not appeal that disqualification to the Board. Accordingly, the Board advised counsel that Comanche's application was dismissed. *See* 47 CFR § 1.276(f). Such dismissals are *pro forma*. *E.g., Hispanic Keys Broadcasting Corp.*, FCC 88R-17, released March 18, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 1, 1988

BELL ATLANTIC, BELLSOUTH, AND NYNEX FILE REVISIONS TO COST ALLOCATION MANUALS; PUBLIC COMMENT INVITED

On March 14, 1988, the Bell Atlantic telephone companies (Bell Atlantic), BellSouth Corporation (BellSouth) and the NYNEX telephone companies (NYNEX) filed revisions to their Part 64 cost allocation manuals for the separation of regulated and nonregulated costs. The original manuals were filed in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987). The Common Carrier Bureau approved the manuals on December 28, 1987, conditional upon the filing of numerous specified revisions. *See Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 109 (1988); BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 128 (1988); NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 81 (1988).

Comments on the revisions to the Bell Atlantic, BellSouth, and NYNEX manuals may be filed (in separate pleadings) no later than **April 22, 1988.** Replies should be filed by **May 9, 1988.** Comments should reference the following file numbers:

Bell Atlantic AAD 7-1671

BellSouth AAD 7-1677

NYNEX AAD 7-1678

Copies of the cost manual revisions may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are also available for public inspection and copying in Room 812, 2000 L St., N.W., Washington, D.C. 20554.

For further information contact Jane Jackson at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HOME BOX OFFICE, INC. File No. 5416-DSE-MP/L-87

For modification of earth station license (E-4063) for the provision of transborder service.

ERRATUM

Released: April 1, 1988

On March 1, 1988, the Commission's Common Carrier Bureau released a Memorandum Opinion & Order and Authorization (DA 88-223) in the captioned proceeding. Inadvertently, the signature block and footnotes were omitted. They are included here. Additionally, the pages of the attachments where misassembled. Each page of the attachments was collated showing the even numbered page first.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division

FOOTNOTES

[1] HBO plans to serve: Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Canada, Cayman Islands, Costa Rica, Dominican Republic, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Montserrat, Netherlands Antilles, Panama, St Christopher-Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago and the Turks and Caicos Islands.

[2] *See* Letter dated March 1, 1985 from Diana Lady Dougan, Office of Coordinator International Communications and Information Policy to Mark S. Fowler, Chairman, FCC.

[3] *See* Letter from Diana Lady Dougan, U.S. Coordinator and Director, Department of State, to Chairman Dennis Patrick dated December 23, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-94

In the Matter of

Amendment of Section 73.202(b), RM-5584
Table of Allotments,
FM Broadcast Stations.
(Mesquite, Nevada)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 1 1988

By the Deputy Chief, Policy and Rules:

1. The Commission has before it the petition for reconsideration filed by Dale G. Gardner (petitioner), of the *Report and Order*, 2 FCC Rcd 6269 (1987), which denied petitioner's request for the allotment of Channel 248C1 to Mesquite, Nevada, as the community's first local FM service. No comments were filed in response to the petition for reconsideration.[1]

2. The *Notice of Proposed Rule Making* recognized that Channel 248C1 could be allocated to Mesquite in compliance with the Commission's minimum distance separation requirements. However, since the place was not listed in the 1980 U.S. Census, nor incorporated, we requested that the petitioner provide information which would enable the Commission to determine whether Mesquite is a community for allotment purposes. As stated in the *Report and Order*, the petitioner filed comments reiterating his intention to apply for the channel but failed to provide the requested information which would enable the Commission to determine whether Mesquite is a community for allotment purposes.

3. Petitioner, in its reconsideration request, states that Commission erred in finding that Mesquite is not an incorporated community. He appends a copy of the May 11, 1984, Certificate of Incorporation of the City of Mesquite, Clark County, Nevada, as a City of the Third Class. Further, he provides information showing that Mesquite has its own local government, with a Mayor and three-member city council, city manager, city clerk, and other municipal officials, a local police force and volunteer fire department. In addition, according to the City Manager, Mesquite has a population of 1,680 persons and over 100 businesses licensed to operate in the community.

4. We believe the public interest would be served by allocating Channel 248C1 to Mesquite, as the community's first local FM service. We find that petitioner has adequately shown that Mesquite is an incorporated community and in addition meets the definition of a community for allotment purposes, that is, "a geographically identifiable population grouping." Grant of this reconsideration request complies with Section 1.429(b)(3) in that consideration of the information presented could allow for earlier inauguration of a first local service to the community and further the efficient use of administrative resources by negating the need to conduct a further rule making proceeding. Channel 248C1 can be allocated to Mesquite in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Mesquite, Nevada	248C1

6. The window period for filing applications will open on, **May 17, 1988,** and close on **June 1, 1988.**

7. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Dale G. Gardner IS GRANTED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the filing of the reconsideration request was given on November 16, 1987, Report No. 1691.

[2] The coordinates for Mesquite are: North Latitude 36o, 48' 20"; West Longitude 114o, 03' 59".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-454

In the Matter of

Amendment of Section 73.202(b),	RM-5499
Table of Allotments,	RM-5830
FM Broadcast Stations.	
(Frostburg and Grantsville,[1]	
Maryland)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, in this proceeding, 1 FCC Rcd. 1326 (1986), proposing the allotment of Channel *246A to Frostburg, Maryland, reserved for noncommercial educational use. He's Alive, Inc. (petitioner) filed comments and reply comments. WJAC, Incorporated, filed comments and a counterproposal.

BACKGROUND

2. The petitioner proposed the allotment of commercial FM Channel *246A to Frostburg reserved for noncommercial educational use. It stated that none of the 20 channels reserved for noncommercial educational use (Channels 201 to 220) were available for use in the Frostburg area due to the proximity of Station WJAC-TV, Channel 6, Johnstown, Pennsylvania. As a consequence, the petitioner urged that the allocation and reservation of a commercial channel is the only means to provide a second noncommercial educational FM service to Frostburg.

3. In its comments, WJAC, Incorporated (WJAC), licensee of Station WJAC-TV, filed a counterproposal proposing that Channel *246A be allotted to Grantsville, Maryland, in lieu of existing noncommercial educational Channel 212B. Channel 212B is currently in use by FM Station WAIF, Grantsville. In this connection, WJAC notes that the petitioner is also the permittee of Station WAIF and the covering license application (File No. BLED- 841001DW) remains in pending status because of the opposition filed by WJAC. In its opposition, WJAC contends that this Class B noncommercial educational facility causes severe interference in the Grantsville area to the reception of Station WJAC-TV. Further, WJAC states that the allotment of Channel *246A to Grantsville would alleviate the existing interference problem and provide reception service to Frostburg.

4. In reply comments, the petitioner restates its view that none of the 20 channels reserved for noncommercial educational use are available in the Frostburg area. The petitioner also argues that the allotment of Channel *246A to Grantsville would be "improper" since there has been no expression of interest in this channel at Grantsville.

5. After careful consideration of this matter, we will dismiss the counterproposal for Grantsville and allot Channel *246A to Frostburg for noncommercial educational use.[2] The proposed Channel *246A allotment at Grantsville is being dismissed because no party has expressed an interest in applying for a Class A channel in Grantsville. *See Reno, Nevada and Redding, California*, 51 Fed. Reg. 2501, published January 17, 1986. We also believe that it is inappropriate in this proceeding to substitute Channel *246A in lieu of Channel 212B at Grantsville in order to resolve the pending contested matter involving the licensing of Station WAIF. Instead, that proceeding should be resolved on the basis of the pleadings filed in connection with the Station WAIF license application. In regard to the Channel *246A proposal for Frostburg, we concur that there are no noncommercial educational channels available in the Frostburg area. Frostburg is located approximately 75 miles from Johnstown and within the Grade B contour of Station WJAC-TV. With respect to the 20 noncommercial educational FM channels, Section 73.525 of the Rules specifies a minimum of 154 kilometers (95 miles) to avoid interference to television Channel 6. Accordingly, the appropriate action in this proceeding is to allot commercial Channel *246A to Frostburg and reserve it for noncommercial educational use.[3] *See Comobabi, Arizona*, 47 Fed. Reg. 32717, published July 29, 1982, and *Burlington and Newport, Vermont*, 45 RR 2d 786 (1979). Finally, we shall accept and process applications for this allotment by the cut-off procedure utilized for other noncommercial educational FM applications. *See Palm Desert, California*, 2 FCC Rcd. 1289 (1987).

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the following community:

Community	Channel No.
Frostburg, Maryland	*246A, 287B

7. IT IS FURTHER ORDERED, That the counterproposal by WJAC, Incorporated for Channel *246A at Grantsville, Maryland (RM-5830) IS HEREBY DISMISSED:

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] This community has been added to the caption.

[2] In its comments, WJAC asserts that the operation by the petitioner of two noncommercial educational FM stations in communities 13 miles apart would be an "inefficient spectrum utilization". This argument is not well taken in that the multiple ownership rules specifically do not apply to noncommercial educational FM stations. *See* Section 73.3555(f) of the Rules. This petitioner would be eligible to apply for Channel *246A at Frostburg.

[3] The reference coordinates for this allotment are 39 39' 18" and 78 55' 36".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-335

In the Matter of

Amendment of Section 73.504(a), RM-4853
Table of Allotments,
Noncommercial Educational
FM Broadcast Stations.
(Mt. Laguna, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making* herein, 50 FR 49073, issued in response to a petition for rule making filed by Family Stations, Inc. (petitioner), seeking the allotment of FM Channel 203A to Mt. Laguna, California. Supporting comments were filed by petitioner reiterating an intention to apply for the channel. No reply comments were received.

2. Although the *Notice* indicated that Channel 203A could be allotted to Mt. Laguna consistent with the minimum distance separation requirements of Sections 73.207(b) and 73.507 of the Commission's Rules, we subsequently discovered that due to the inadvertent omission of adjusted coordinates for Channel 203A at Agua Hector, Baja, Mexico, from the Commission's records, the proposal is 58 kilometers short-spaced thereto. However, since we believe that the proposal has merit, we determined that Channel 205A could be allotted to Mt. Laguna at a restricted site 19.1 kilometers east of the community. Accordingly, Mexican concurrence to the revised proposal has been requested.

3. Disposition of the instant allotment request is now affected by the recent Commission action in MM Docket No. 87-140.[1] At the time this proceeding was initiated, petitioner was required to conform with the requirements of Section 73.207(b) of the Commission's Rules. That section provided, in pertinent part, that, pursuant to the United States-Mexican Broadcasting Agreement,[2] domestic noncommercial educational FM (NCE-FM) allotments located within 320 kilometers (199 miles) of the United States-Mexican border (border area) must be separated from Mexican allotments and from each other by specified distances. While this proceeding was pending, the Commission amended its Rules in MM Docket 87-140. As a result, applicants for new NCE-FM broadcast stations or for upgrades of existing facilities within the border area may now base their spacings on the non-overlap of predicted signal strength contours (contour method) with regard to domestic NCE-FM stations, provided the minimum separation requirements are met with respect to Mexican and domestic commercial stations. Thus, the authorization of new NCE-FM stations are now determined on a protected contour basis for the border area as with the rest of the country. Accordingly, a NCE-FM applicant need not establish an allotment before applying for an authorization. [3]

4. On the basis of the foregoing, the proposal herein is appropriate for consideration in the application context rather than at the rule making level. *See* footnote 4 of the *Report and Order* in MM Docket No. 87-140.

5. Accordingly, IT IS ORDERED, That the petition for rule making filed by Family Stations, Inc. (RM-4853) IS HEREBY DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] *Report and Order, Review of Technical and Operational Requirements : Part* 73-C Noncommercial Educational FM Broadcast Stations, 52 FR 43764, November 16, 1987.

[2] "Agreement between the United States of America and the United Mexican States Concerning Frequency Modulation in the 88 to 108 MHz Band," ratified in Washington, D.C., November 9, 1972. Pertinent provisions of the Agreement are contained in 47 CFR Sections 73.207 and 73.504. See, Report and Order in Docket No. 19987, 50 FCC 2d 172 (1974).

[3] However, it should be noted that pursuant to the Agreement, supra, it is a mandatory prerequisite that proposals within 199 miles of the common border area receive concurrence by the Mexican government. As previously indicated, consent for the use of Channel 205A at Mt. Laguna has been requested by the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-507

In the Matter of

Amendment of Section 73.202(b), RM-5501
Table of Allotments,
FM Broadcast Stations.
(Cape Coral, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has under consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 756 (1987), which proposed the substitution of Channel 279C2 for Channel 280A at Cape Coral, Florida, and modification of the license for Station WRCC(FM), accordingly, at the request of the licensee, Radio Cape Coral, Inc. Comments were filed by Litchfield Broadcasting Corporation, and by the petitioner.[1]

2. The petitioner, in its comments, argues that the *Notice* imposed a site restriction on Channel 279C2 which would necessitate a move of Station WRCC's antenna. However petitioner asserts that it can operate on Channel 279C2 at its existing transmitter location in compliance with the requirements of Section 73.207.

3. The *Notice* stated that the proposal for Channel 279C2 at Cape Coral was short spaced by 6.8 kilometers to the buffer protection for Station WDUV(FM), Bradenton, Florida. We also indicated that the spacing requirements were met based on a construction permit issued to WDUV. The modification of license for Station WRCC was proposed contingent on a license being issued for WDUV's construction permit. As of March 2, 1987, the buffer zone protection for Station WDUV(FM) at Bradenton no longer exists. WDUV presently has on file an application which meets the spacing requirements to the proposal for Channel 279C2 at Cape Coral.[2] Thus the license modification for Station WRCC can be accomplished as requested by the petitioner at its current site.

4. In accordance with our present modification policy, we shall substitute Channel 279C2 for Channel 280A at Cape Coral, Florida, in order to provide a wide coverage area station to that community. *See* Section 1.420(g) of the Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below:

City	Channel No.
Cape Coral, Florida	279C2, 292A

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license held by Radio Cape Coral, Inc., for Station WRCC(FM), Cape Coral, Florida, IS MODIFIED effective **May 16, 1988,** to specify operation on Channel 279C2 in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301);

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620;

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner filed late comments which we have accepted for the purpose of permitting petitioner to restate its interest in Channel 279C2 at Cape Coral.

[2] The comments of Litchfield merely inform the Commission of its Petition to Deny WDUV's application (BPH 860313ID), and the Opposition to Request for Waiver of Section 73.207.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-262

In the Matter of

Amendment of Section 73.202(b), RM-5727
Table of Allotments,
FM Broadcast Stations.
(Newberry, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 4328 (1987), proposing the substitution of FM Channel 229C2 for Channel 228A at Newberry, Michigan, and modification of the license for Station WNBY, to specify operation on the higher class channel. The *Notice* was issued in response to a petition filed by Jack St. Andre (petitioner). Comments were filed by the petitioner restating his interest in the channel. Opposition comments were filed by Leon B. Van Dam.[1] Reply comments were filed by the petitioner.

2. Van Dam is an applicant for FM Channel 250C2 at Newberry, Michigan (871014MB). Van Dam argues that petitioner has been the licensee of Station WNBY(AM-FM) for the past five years and at no time heretofore has indicated a desire to upgrade the facility to provide coverage to a larger area. Van Dam contends that a market such as Newberry might best be served by one local station and one wide area station, with each station serving their segment of the market. According to Van Dam, the expense for the change in frequency and power would run into the tens of thousands of dollars and would do little to strengthen the financial position of Station WNBY or Mr. St. Andre.

3. Petitioner, in reply comments, argues that Van Dam's comments constitute an attempt to handicap the ability of Station WNBY to compete with the new allocation at Newberry of Channel 250C2 for which Van Dam indicated his intention to apply. According to petitioner, the public interest would better be served by permitting Station WNBY to upgrade its facilities than to permit the new facility (Channel 250C2) to hold a competitive advantage over Station WNBY. In response to Van Dam's allegation that petitioner only recently decided to upgrade its facility, he submits that the petition for rule making was but one step in the five-year plan he formulated at the time he obtained the station. Further, petitioner states he has spent substantial funds on station equipment, technical facilities and engineering services to improve both the quality of the station's signals and programming.

4. We believe the public would be served by substituting Channel 229C2 for Channel 228A at Newberry, Michigan, since it could provide the community with its second wide coverage area FM service. Channel 229C2 can be allocated to Newberry in compliance with the minimum distance separation requirements of the Commission's Rules.[2] Since Newberry is located within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government has been obtained. As proposed, we shall also modify the license of Station WNBY to specify Channel 229C2. As for Van Dam's allegation of economic impact, the Commission recently decided that such issues were not appropriate for consideration. *See Report and Policy Statement* (MM Docket 87-68) released February 11, 1988.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Newberry, Michigan	229C2, 250C2

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WNBY, Newberry, Michigan, IS MODIFIED TO SPECIFY operation on Channel 229C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authrize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The comments filed by Van Dam were not officially received at the Commission until September 14, 1987, but the certificate of service indicates that they were mailed on September 7, 1987, and petitioner acknowledges that filing date in his reply comments. The comment date expired on September 11, 1987.

[2] The coordinates for the channel at petitioner's current site are: 46-18-41 and 85-30-44.

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 82-664

In the Matter of

Amendment of Section 73.504(a), Table of Allotments, Noncommercial Educational FM Broadcast Stations. (Bisbee, Arizona) — RM-4181

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making* herein, 47 FR 43740, issued in response to a petition for rule making filed by Lee M. Spinks (petitioner) on behalf of Tea Multimedia.[1] Supporting comments were filed by petitioner reiterating an intention to apply for the channel.[2] No reply comments were received.

2. Disposition of the instant allotment request is affected by the recent Commission action in MM Docket No. 87-140. [3] At the time this proceeding was initiated, petitioner was required to conform with the requirements of Section 73.207(b) of the Commission's Rules. That section provided, in pertinent part, that, pursuant to the United States-Mexican Broadcasting Agreement,[4] domestic noncommercial educational FM (NCE-FM) allotments located within 320 kilometers (199 miles) of the United States-Mexican border (border area) must be separated from Mexican allotments and from each other by specified distances. While this proceeding was pending, the Commission amended its Rules in MM Docket 87-140. As a result, applicants for new NCE-FM broadcast stations or for upgrades of existing facilities within the border area may now base their spacings on the non-overlap of predicted signal strength contours (contour method) with regard to domestic NCE-FM stations, provided the minimum separation requirements are met with respect to Mexican and domestic commercial stations. Thus, the authorization of new NCE-FM stations are now determined on a protected contour basis for the border area as with the rest of the country. Accordingly, a NCE- FM applicant need not establish an allotment before applying for an authorization.[5]

3. On the basis of the foregoing, the proposal herein is appropriate for consideration in the application context rather than at the rule making level. *See* footnote 4 of the *Report and Order* in MM Docket No. 87-140.

4. In view of the above, the comments filed in this proceeding are moot.

5. Accordingly, IT IS ORDERED, That the petition for rule making filed by Lee M. Spinks, on behalf of Tea Multimedia (RM-4181) IS HEREBY DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Although petitioner's affiliation with Tea Multimedia was not identified in his initial proposal, it was subsequently announced in supporting comments.

[2] Tea Multimedia also filed timely comments seeking the possible allotment of an alternate NCE frequency to Bisbee since it believed that Channel 217A would place it in close proximity to commercial Station KZMK(FM) (Channel 221A), Bisbee. However, since proposed Channel 217A is not an adjacency to Station KZMK(FM), no recognized interference should occur.

[3] *Report and Order, Review of Technical and Operational Requirements : Part* 73-C Noncommercial Educational FM Broadcast Stations, 52 FR 43764, November 16, 1987.

[4] "Agreement between the United States of America and the United Mexican States Concerning Frequency Modulation in the 88 to 108 MHz Band," ratified in Washington, D.C., November 9, 1972. Pertinent provisions of the Agreement are contained in 47 CFR Sections 73.207 and 73.504. See, Report and Order in Docket No. 19987, 50 FCC 2d 172 (1974).

[5] However, it should be noted that pursuant to the Agreement, supra, it is a mandatory prerequisite that proposals within 199 miles of the common border area receive concurrence thereto by the Mexican government. Such consent for the use of Channel 217A at Bisbee was requested by the Commission, but no response was received from the Mexican officials.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-518

In the Matter of

Amendment of Section 73.606(b), RM-5659
Table of Allotments,
TV Broadcast Stations.
(Yosemite Valley, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* herein, 2 FCC Rcd 1131 (1987), issued in response to a petition filed on behalf of Pappas Telecasting Incorporated (petitioner), proposing to allot Channel 41[1] to Yosemite Valley, California, as its first television service. Supporting comments were filed by petitioner[2] reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. As indicated in the *Notice*, a staff engineering analysis has determined that UHF television Channel 41 can be allotted to Yosemite Valley consistent with the minimum distance separation requirements contained in Sections 73.610 and 73.698 of the Commission's Rules. [3] Therefore, we believe the public interest would benefit from this proposal since it could provide a first local television service.

3. However, the Commission has recently imposed a freeze on television allotments, or applications therefor, in certain metropolitan areas, pending the outcome of an inquiry into the uses of advanced television systems (ATV) in broadcasting.[4] Among the markets affected by the freeze is Sacramento and Stockton, California. Yosemite Valley is situated within the zone encompassed by those communities.[5] Thus, interested parties are advised that no applications will be accepted for Channel 41 at Yosemite Valley during the freeze.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED to include Yosemite Valley, as follows:

City	Channel No.
Yosemite Valley, California	41

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the application filing process should be addressed to the Video Services Division, Television Branch, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] As indicated in the *Notice*, although the petitioner requested that Channel 51 be reallocated from Merced to Yosemite Valley, we determined that Channel 41 could be allotted instead, thus avoiding deletion of the only television allotment at Merced (for which two applications are pending).

[2] Petitioner's comments were submitted one day after the deadline specified therefor. However, since the comments relate solely to petitioner's continuing support of the proposal, they have been accepted.

[3] Reference coordinates utilized for Channel 41 at Yosemite Valley are as follows: 37-44-42; 119-35-12.

[4] *See* Notice *of Inquiry*, 2 FCC Rcd 5125 (1987), and *Order*, 52 FR 28346, July 19, 1987, freezing the filing of construction permit applications for vacant UHF television channels in the affected areas.

[5] Specifically, Yosemite Valley is within the minimum co-channel separation distances specified in Section 73.610(b) of the Commission's Rules from the reference points given in Section 76.53 for the affected cities listed in the Appendix to the freeze *Order*. *See* footnote 4, supra.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 1, 1988

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. Typically, these responses to individuals are not released to the public or published in the FCC Record *(See* 0.445(a) of the rules).

However, in order to provide the public with a clearer understanding of this new process, these decisions will be made available to the public. Periodically, the Managing Director will release a Public Notice listing the decisions he has made on these matters. The decisions will then be placed in General Docket 86-285. A copy of the decision will also be placed in the appropriate docket, if one exists. In the future, it may be decided to publish only those decisions that establish new precedents or may be of wide interest. All decisions will continue to be placed in the appropriate docket.

The following Managing Director decisions are released for information:

William S. Page - Withdrawal of Petition to Dismiss Application for Grifton, N. C. FM Construction Permit Granted (December 31, 1987) MM Docket No. 87-346)

Vince Lee Broadcasting - Reconsideration of FM Construction Permit Dismissal Granted (January 4, 1988)

International Seafarer's Center of Long Beach - Request for Exemption or Waiver of Commission's Fee Denied (January 4, 1988)

National Cable Satellite Corporation d/b/a C-Span - Waiver of Commission's Fee Denied (January 4, 1988)

Martin J. Rieman - Waiver of Commission's Fee Denied (January 4, 1988)

Family Stations, Inc - Refund of Commission's Fee Granted - Non-commercial, Educational Station Not Feeable (January 19, 1988)

Union Broadcasting, Inc. - (WRAJ-FM) Waiver of Commission's Filing Fee Denied, (February 18, 1988)

Roberto Passalacqua, Esq - Application for Construction Permit - (Channel 292A) Request for Reconsideration Granted, (February 22, 1988)

Kay and John W. Abbott d/b/a Faith Broadcasting - Application for Construction Permit (Channel 239A)- Request for Reconsideration Granted, (February 23, 1988)

For further information, contact Thomas M. Holleran at (202) 632-5316.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-362

In re Applications of

BOTT COMMUNICATIONS, INC. File No. BPH-850503MA

For Construction Permit for a New FM Station Hastings, Nebraska

NOTICE

Released: March 15, 1988

Administrative Law Judge Walter C. Miller's Summary Decision in this proceeding (FCC 88D-1) was released January 21, 1988. No exceptions have been filed, and the Commission has not ordered a review of the Summary Decision on its own motion. Fifty days have passed since public release of the Summary Decision. Pursuant to Section 1.276 of the Commission's Rules, the Summary Decision became effective on March 11, 1988 without action by the Commission.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION
Revisions to Tariff F.C.C. No. 103

Transmittal No. 680

ORDER

Adopted: March 15, 1988 ; Released: March 18, 1988

By the Chief, Common Carrier Bureau:

1. On December 22, 1987, Communications Satellite Corporation (Comsat) filed the above-referenced transmittal, proposing new International Business Satellite (IBS) service offerings in an effort to promote IBS worldwide. Pan American Satellite (PAS) has filed a petition to suspend and investigate[1] and Comsat has replied.[2] The tariff is scheduled to become effective on March 21, 1988.

2. By Transmittal No. 680, Comsat proposes to, *inter alia* : (1) introduce duplex service at a rate below that for two simplex channels to give all multi-year IBS services a rate reduction to all regions at C-band and K-band; (2) reintroduce a seven-year contract for IBS to permit rollovers from existing seven-year frequency modulation contracts; and (3) reduce multi-year 64 Kbps IBS contract rates at C-band, with the rates varying by geographic region.

3. PAS argues that Comsat's transmittal is a "substitute proposal" for Comsat's earlier "Caribnet" filing. PAS Petition at 3. [3] According to PAS, the transmittal would reduce Comsat's IBS rates to a level approaching that proposed in the Caribnet filing. Further, PAS asserts, although the instant filing "nominally" applies to IBS rates for all regions, its predominant impact is likely to be in the Caribbean region. *Id.* at 3-4. PAS also contends that Comsat proposes to charge different rates for routes for which its costs are identical, a violation of Section 202 of the Communications Act. *Id.* at 6. PAS further submits that Comsat has provided no support for its claim that the rate reductions are designed to meet competition. *Id.* at 4. PAS also argues that Comsat has not adequately explained the basis for its proposal to charge substantially less for acquiring a duplex channel than for acquiring two simplex channels independently. *Id.* Finally, PAS maintains, Comsat has failed to provide the detailed cost support information required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. *Id.* at 6.

4. Comsat replies that "on every important point," the proposed tariff differs from the Caribnet filing. Comsat Reply at i. According to Comsat, the proposed reductions are smaller than those in the Caribnet tariff, both in absolute terms and in terms of their relation to existing rates. *Id.* at 4. Further, Comsat contends, unlike Caribnet, the proposed reductions do not target a narrow region; rather, they reduce IBS rates worldwide. *Id.* at 6. Comsat asserts that its regional price differentials are neither unjust nor unreasonable, but reflect the different competitive environments in the regional groupings. *Id.* at 10. Comsat also argues that the instant filing differs from Caribnet in that it does not rely on or incorporate any route-specific Intelsat discount. *Id.* at 8. In addition, Comsat submits, lower rates are necessary in view of competition from domestic satellites (domsats) and fiber optic cable providers. While admitting that many facilities are not yet operational, Comsat claims that all are currently seeking customers. *Id.* at 11. Comsat also asserts that its in-house cost for providing a duplex channel is lower than the cost associated with two simplex channels. *Id.* at 9. Finally, Comsat contends that it has furnished sufficient cost information. *Id.* at 12.

5. The Common Carrier Bureau has reviewed Comsat's filing, the PAS petition, and Comsat's reply. We find that no compelling argument has been presented that the proposed tariff revisions are so patently unlawful as to require rejection, and that an investigation of the revisions is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition filed against Communications Satellite Corporation's Tariff F.C.C. No. 103, Transmittal No. 680, by the above-listed petitioner IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] PAS Petition To Suspend and Investigate, filed Jan. 6, 1988 (PAS Petition).

[2] Comsat Reply, filed Jan. 19, 1988 (Comsat Reply).

[3] Comsat's Caribnet filing proposed to introduce Caribbean Business Service, to provide IBS and Datanet Service at reduced rates to the Caribbean Islands. The Common Carrier Bureau concluded that the issues raised by the Caribnet filing were sufficient to warrant suspension and investigation of the proposed tariff. Comsat, Tariff F.C.C. No. 103, Transmittal No. 630, CC Docket No. 87-111, Memorandum Opinion and Order, 2 FCC Rcd 2420 (1987). Comsat, however, withdrew the suspended rates before the date designated for it to file its direct case. Accordingly, the Bureau terminated the investigation as moot. Comsat, Tariff F.C.C. No. 103, Transmittal No. 630, CC Docket No. 87-111, Order, 2 FCC Rcd 5108 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Revisions to Tariff F.C.C. No. 13

Transmittal No. 1130

ORDER

Adopted: March 16, 1988; Released: March 18, 1988

By the Chief, Common Carrier Bureau:

1. On February 9, 1988, AT&T Communications (AT&T)[1] filed the above-referenced transmittal,[2] proposing to reduce AT&T's International Message Telecommunications Service (IMTS) dial-station initial period and all additional-minute period rates for service to 171 countries or areas from Puerto Rico and the U.S. Virgin Islands. [3] According to AT&T, these countries represent approximately 80 percent of all countries which AT&T serves from Puerto Rico and the U.S. Virgin Islands. The tariff is scheduled to take effect on March 19, 1988. Puerto Rico Telephone Company (PRTC) filed a petition to investigate or reject[4] and AT&T has replied.[5]

2. PRTC argues that even after the proposed reductions, AT&T's rate-of-return for off-island international services will remain unreasonably high. PRTC Petition at 6. PRTC also asserts that AT&T refrained from disclosing available cost information to obtain the Tariff Division's grant of special permission to file the transmittal without cost justification. *Id.* at 2. According to PRTC, AT&T failed to mention a rate-of-return study PRTC submitted in its pending complaint proceeding. *Id.*[6] Further, PRTC asserts, AT&T had access to cost-of-service information even before it acquired AAC&R. *Id.* at 3-5.

3. AT&T replies that PRTC's requested relief is contrary to PRTC's assertion that it favors reductions in rates for off-island international service. AT&T Reply at 3-4. AT&T also argues that contrary to PRTC's contention, it did not have data appropriate for ratemaking purposes either before or at the time it acquired AAC&R and ITTCI-VI. *Id.* at 5-6. In addition, AT&T submits, the rate-of-return analysis which accompanied PRTC's complaint is invalid. *Id.* at 7. Moreover, AT&T argues, even if the analysis were reliable, it would not provide a basis for investigating revisions which reduce the rates to a more appropriate level. *Id.* at 7.

4. The Common Carrier Bureau has reviewed AT&T's filing, the PRTC petition, and AT&T's reply. We find that no compelling argument has been presented that the proposed tariff revisions are so patently unlawful as to require rejection, and that an investigation of the revisions is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to investigate or reject filed against AT&T Communication's Tariff F.C.C. No. 13, Transmittal No. 1130, by the above-listed petitioner IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T has been providing international services from Puerto Rico and the U.S. Virgin Islands since July 1987, when AT&T acquired All American Cables and Radio, Inc. (AAC&R) and ITT Communications, Inc.-Virgin Islands (ITTCI-VI) from their parent, ITT Communications Services, Inc. The name of AAC&R was changed to AT&T of Puerto Rico (AT&T-PR); ITTCI-VI-VI was changed to AT&T of the Virgin Islands (AT&T-VI).

[2] On February 5, 1988, the Tariff Division granted AT&T's request for waiver of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. AT&T requested this cost support waiver on the ground that it did not then have cost support data from AAC&R and ITTCI-VI. AT&T indicated that it did not want to delay its planned rate reductions while it gathered information to allow AT&T to identify accurately the costs of providing international services. AT&T stated that it would provide appropriate economic support by August 2, 1988.

[3] AT&T proposes to lower rates in three bands by 3, 6, and 10 percent, respectively. AT&T states that since cost information was unavailable, it based its reductions on a country-specific comparison between AT&T's revenues and the applicable IMTS accounting rates.

[4] PRTC Petition To Investigate or Reject, filed Feb. 24, 1988 (PRTC Petition).

[5] AT&T Reply, filed Mar. 7, 1988 (AT&T Reply).

[6] The rate-of-return analysis served as the basis for PRTC's formal complaint against AAC&R, filed on February 24, 1987. PRTC's complaint is still pending. In February 1988, a PRTC consultant prepared an analysis of the impact of AT&T's proposed reductions in the pending transmittal on AT&T's rate-of-return, concluding that AT&T's 1988 rate-of-return for off-island international services will exceed 350 percent. PRTC Petition at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re: Application of

DUBUQUE T.V. LIMITED PARTNERSHIP (Assignor) File No. BALCT-871204KE

and

SAGE BROADCASTING CORPORATION OF DUBUQUE, IOWA (Assignee)

For Assignment of Television License for KDUB-TV, Dubuque, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: March 25, 1988; Released: April 4, 1988

By the Chief, Video Services Division:

1. The Chief, Video Services Division, has under consideration: (a) the application of Dubuque T.V. Limited Partnership (hereinafter "DTV") to assign the license of Station KDUB-TV (ABC, Channel 40), Dubuque, Iowa, to Sage Broadcasting Corporation of Dubuque, Iowa (hereinafter "Sage"); (b) a petition to deny filed by Cedar Rapids Television, Inc. (hereinafter "CRTV), licensee of Station KCRG-TV (ABC, Channel 9), Cedar Rapids, Iowa;[1] and (c) responsive pleadings.

The Petition to Deny

2. CRTV, in its petition, alleges that DTV has conspired with the local Dubuque cable television system, operated by TCI Cablevision of Dubuque, Inc. (hereinafter "TCI), to black out the programming of KCRG-TV on TCI's system in violation of §76.92(g) of the Commission's Rules concerning network program nonduplication protection.[2] In this regard, CRTV alleges that DTV and TCI have entered into a verbal agreement concerning the deletion of KCRG-TV's network programming and that this agreement is a restraint of trade which violates both federal antitrust law (§1 of the Sherman Antitrust Act, 15 U.S.C §1 (1973)) and Iowa competition law (Iowa Code, Title XXIII, §553.4). The agreement, contends CRTV, is specifically referenced in Section XXII of the Asset Purchase Agreement signed by DTV and Sage, a copy of which DTV has submitted with its application. Accordingly, argues CRTV, DTV's application should be set for a hearing.

3. In opposition to CRTV, DTV denies that it has violated any Commission rule, and further denies that it has engaged in anticompetitive conduct. Citing *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U. S. 1169 (1986), and *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, _____ F.2d _____ (D.C. Cir. 1988), in which the court struck down the Commission's mandatory signal carriage rules, DTV states that CRTV cannot demand that TCI carry KCRG-TV's signal in whole or in part, including the station's network programming.

DISCUSSION

4. CRTV raises two allegations against DTV in this proceeding: one of anticompetitive conduct, and one of violating Commission rules. With regard to the former, CRTV contends that DTV has acted in concert with TCI to bar the network programming of KCRG-TV from reaching Dubuque cable subscribers. Recently, following an extensive inquiry regarding character qualifications in broadcast licensing, the Commission reevaluated and revised its policies and litigation reporting requirements for applicants, permittees, and licensees. *Character Qualifications*, 102 FCC 2d 1179 (1985), *recon. denied*, 1 FCC Rcd 421 (1986), *appeal docketed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. March 17, 1986). Consistent with our regulatory responsibilities, our concern was refocused on misconduct which violates the Communications Act or a Commission Rule or policy, and certain specific non-FCC misconduct which demonstrates the proclivity of an applicant not to deal truthfully with the Commission and not to comply with our rules and policies. *See Character Qualifications*, 102 FCC 2d at 1190-91. With respect to non-FCC misconduct,[3] we determined that adjudications of both criminal and civil violations of law, in which a specific finding of fraudulent representation to another governmental unit was made, may be considered as having a potential bearing on character qualifications. Finally, broadcast related antitrust or anticompetitive misconduct that had risen to a level of an adjudicated violation could be relevant to the Commission's licensing concerns. We, however, stated that we would

> refrain from taking any action on non-FCC misconduct prior to adjudication by another agency or court . . . . We will not take cognizance of non-FCC misconduct involving criminally fraudulent misrepresentations, alleged criminal activity and antitrust or anticompetitive misconduct unless it is adjudicated . . . . In this regard, there must be an ultimate adjudication by an appropriate trier of fact either by a government agency or court, before we will consider the activity in our character determinations.[62]

[62] We believe it appropriate to consider only those adjudications made by an ultimate trier of fact. Tribunals whose factual determinations may be reviewed *de novo* will not be considered unless the time for taking such review has expired under the relevant procedural rules.

Id. at 1204-05. CRTV has submitted no evidence of any prior adjudication of anticompetitive practices by DTV which would dictate the need for a hearing. While we recognize that we have reserved the right to act in certain cases prior to adjudication by another governmental agency or court when faced with circumstances that "shock the conscience and evoke almost universal disapprobation," *Character Qualifications*, 102 FCC 2d at 1205 n. 60, we find nothing in CRTV's allegations concerning DTV's ac-

tions that descends to such a level. Therefore, based on the foregoing, we find that CRTV has failed to raise any substantial and material question of fact to warrant any further inquiry concerning DTV's alleged anticompetitive behavior.

5. We note that CRTV's allegations of rule violations are all based upon the noncarriage of CRTV's network programming when it is simultaneously duplicative of DTV's. While KDUB-TV's former licensee did seek and obtain a waiver of §76.92(g) of the Rules, which would otherwise have exempted CRTV's programming from the rule's blackout requirements, this waiver expired on January 7, 1986. *See* note 2, *supra*.[4] However, prior to that date, on July 19, 1985, the United States Court of Appeals for the District of Columbia Circuit struck down the Commission's mandatory signal carriage rules as unconstitutional, in *Quincy Cable TV, Inc. v. FCC*, *supra*. Accordingly, upon the expiration of the waiver, so long as particular programs were carried in full, the choice of whether to carry all, none, or part of CRTV's programming, network or otherwise, was up to the cable system. CRTV could not demand carriage. Although the Commission subsequently adopted new, more limited, mandatory signal carriage rules which became effective on June 10, 1987, *CATV Must-Carry Rules*, 1 FCC Rcd 864 (1986), *modified on recon.*, 2 FCC Rcd 3593 (1987), these rules were also struck down on appeal later that year. *Century Communications Corp. v. FCC*, *supra*. Indeed, while not dispositive of the question, we are constrained to note that, despite its protestations today, CRTV has never sought to initiate a show cause or forfeiture proceeding for the alleged violations of our rules that CRTV now seeks to make the subject of our concern. Based on the record before us, we find no basis to determine that any Commission rule was violated.[5]

CONCLUSION

6. In view of the foregoing, we find that the pleadings filed by CRTV have failed to raise any substantial and material questions of fact to establish that a grant of the instant application would be inconsistent with the public interest. We further find that the applicants are fully qualified and that a grant of the instant application will serve the public interest, convenience, and necessity.

7. Accordingly, IT IS ORDERED, That the petition to deny filed by Cedar Rapids Television, Inc. IS DENIED.

8. IT IS FURTHER ORDERED, That the application assigning the license for Station KDUB-TV, Dubuque, Iowa, from Dubuque T.V. Limited Partnership to Sage Broadcasting Corporation of Dubuque, Iowa, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] As a preliminary matter, we have determined that CRTV's petition was timely filed and that CRTV has standing in this proceeding. *See FCC v. Sanders Bros. Radio*, 309 U. S. 470 (1940).

[2] The Commission's network program nonduplication rules, §§76.92-76.99 of the Commission's Rules, require cable television systems, upon request of local licensees or permittees, to delete the simultaneously duplicating network programming of lower priority signals. With respect to TCI's Dubuque system, KCRG-TV is of lower priority than KDUB-TV. However, §76.92(g) of the Rules exempts the simultaneously duplicating network programming of "significantly viewed" stations from mandatory deletion from a cable television system. With respect to Dubuque, KCRG-TV is considered to be significantly viewed. *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 401 app. B (1972). In 1981, the Commission granted a temporary waiver of §76.92(g) of the Rules with respect to the Dubuque system, permitting the cable operator to black out KCRG-TV's simultaneously duplicating network programming. *KDUB - TV, Inc.* (Dubuque, Iowa), 88 FCC 2d 450 (1981), *recon. denied*, 89 FCC 2d 994 (1982). Although extended, *KDUB - TV, Inc.*, 100 FCC 2d 324 (1984), the waiver expired on January 7, 1986.

[3] "The term non-FCC misconduct describes misconduct which may be a violation of law but does not specifically contravene the Communications Act or a specific Commission Rule or policy." Character Qualifications, 102 FCC 2d at 1183 n. 11.

[4] The Dubuque cable system did not take a position in this proceeding.

[5] In fact, it does not appear that CRTV could have asserted mandatory carriage status for KCRG-TV on TCI's system under the 1987 signal carriage rules. Under former §76.59(a)(6) of the Rules, KCRG-TV was entitled, on request, to mandatory carriage as a significantly viewed station in Dubuque. However, under the 1987 rules, KCRG-TV could not demand carriage based on significantly viewed status alone, but also had to be licensed to community within 50 miles of TCI's principal headend, pursuant to §76.5(d)(l)(i) of the Rules. Cedar Rapids is approximately 60 miles from TCI's headend, based upon information in Commission files.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 4, 1988

AMERICAN TELEPHONE AND TELEGRAPH COMPANY RESPONDS TO INQUIRIES REGARDING ITS DIAL-IT 900 SERVICE FROM THE COMMON CARRIER BUREAU

On February 26, 1988, the Common Carrier Bureau sent a letter of inquiry to AT&T regarding AT&T's DIAL-IT 900 Service and AT&T's Premium Billing contract arrangements. The questions addressed, *inter alia*, the interrelationship between AT&T's 900 service tariff and its premium billing contracts, and whether AT&T's 900 service should be classified as a basic or as an enhanced service. On March 17, 1988, AT&T filed responses to the inquiry.

Comments regarding AT&T's responses may be filed within 30 days after the release date of this Public Notice, and Reply Comments within 20 days thereafter. All filings concerning the Bureau's inquiry and AT&T's responses should refer to File No. ENF-88-5. Copies of the inquiry, responses and any subsequently filed documents in this matter may be obtained from International Transcription Service, 2100 M Street, N.W., Suite 140, Washington, D.C. 20036, (202) 857-3800. The documents are also available for review and copying in Room 6206, 2025 M Street, N.W., Washington, D.C. 20554.

For further information contact Lenworth Smith at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

CORPUS CHRISTI CELLULAR TELEPHONE CO. File No. 00252-CL-TC-1-88
for Commission Consent to Transfer of Control of the Corpus Christi, Texas Non-Wireline Cellular Permit to McCaw Communications of Texas, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: March 25, 1988; Released: April 4, 1988

By the Chief, Mobile Services Division:

1. The United States Independent Cellular Telephone Association, et. al. (USICTA) has filed a petition to deny the above-referenced application for transfer of control of the Corpus, Christi non-wireline cellular permit to McCaw Communications of Texas, Inc. (McCaw).

2. Corpus Christi Cellular Telephone Company (CCCTC), the transferor, has filed an opposition to the petition to deny and McCaw, the transferee, has filed an opposition to the petition to deny. USICTA has filed a reply.

BACKGROUND

3. In its petition, USICTA makes the following arguments: a) that the for-profit sale of the construction permit that is contemplated by the captioned application for transfer is prohibited by Sections 301 and 304 of the Communications Act of 1934, as amended (Act); b) that the transferor has not met its burden of proof pursuant to Section 22.40(b) of the Rules to demonstrate that it was not its intent to speculate in cellular construction permits; c) that McCaw is not financially qualified to be a Commission permittee because the letter McCaw relies on to support its claim of reasonable assurance of funding does not meet the requirements of Section 22.917 of the Rules; d) that the application does not demonstrate that transfer of the permit would be in the public interest and that the applicant has misrepresented the facts in its public interest showing; and e) that McCaw does not possess the character qualifications to be a Commission permittee in the Corpus Christi, Texas market in which it is attempting to buy a stand-alone system because, USICTA alleges, McCaw has engaged in anticompetititve coercive practices to obtain a permit for a stand-alone system in the Chico, California market.

4. In its opposition, CCCTC and McCaw argue that the USICTA petition is procedurally defective because it has not demonstrated USICTA's own standing or that of its purported members. They argue that the petition has failed to: a) state any objective facts supporting USICTA's claim that the grant of the application would injure it or its purported members and that the injury is protected by the Act, and b) include an affidavit affirming the facts alleged in the pleading to establish injury to USICTA or its purported members, as required by the Act and the Rules. The oppositions argue that USICTA's attack on the Common Carrier Bureau's decision in *Madison Cellular Telephone Co.*, 2 FCC Rcd. 5397 (1987) (*Madison Decision)* is procedurally defective as untimely because USICTA was required by Sections 1.106 and 1.115 of the Rules to file either a petition for reconsideration or an application for review within thirty days of the date of public notice of the *Madison Decision*. The oppositions also include arguments that the proposed transfer is fully consistent with Sections 301 and 304 of the Act, Commission Rules and past precedent; that McCaw has demonstrated that the benefits of its proposed regional systems would serve the public interest; that the CCCTC has met its burden of demonstrating that it was not speculating in cellular construction permits within the meaning of Section 22.40(b) of the Rules; that McCaw is financially qualified to consummate the proposed acquisition; and that McCaw has not engaged in anti-competitive conduct and thus does possess the character qualifications to become a Commission permittee.

5. In its reply, USICTA makes the following arguments: a) that USICTA has standing, both as an association and on behalf of its members, to petition the captioned transfer because it has submitted an affidavit in its reply to demonstrate that it would be injured by this transfer;[1] b) that the sale of this construction permit for profit is prohibited by Sections 301 and 304 of the Act; c) that the transferor has not demonstrated that it obtained the permit with the intent to construct; d) that McCaw's financial qualifications have not been fully demonstrated to be in compliance with the Commission's requirements; and e) that McCaw has failed to make the public interest demonstration required by Section 22.13(a)(4) of the Commission's Rules.

STANDING

6. USICTA claims standing to file its Petition to Deny by alleging in Note 1 of its petition to deny and in the affidavit submitted in its reply, that 1) certain of its members as "roamers or drivers" from adjacent areas are potential subscribers to cellular service, and would be adversely impacted by the proposed transfer of control to McCaw and 2) many of its members plan to file applications for adjacent rural cellular markets which would require reaching agreements with McCaw.

7. We agree with CCCTC and McCaw that USICTA lacks standing to petition the captioned application. USICTA has failed to sufficiently allege that either USICTA or its members are parties in interest as required by Section 309(d)(1) of the Act,[2] or Section 22.30(a)(3) of the Commission's Rules, [3] governing the filing of petitions to deny. The Commission has held that to establish such standing, the petition must, *inter alia*, be supported by affidavits listing the names and residences of the allegedly interested parties. *See Mississippi License Renewals*, 59 FCC 2d 1335 (1976).

8. We find that USICTA lacks standing because the affidavit it filed with its reply, to support its claim of standing, is unacceptable. To establish its standing in this proceeding, USICTA has submitted an unsigned, unsworn statement, from an unnamed individual, which also fails to give the individual's address. The statement purports to be

from an individual who resides in Corpus Christi, who expects to subscribe to the non-wireline cellular service and who expects to apply for a construction permit for a non-wireline system in a Rural Statistical Area (RSA) adjacent to the Corpus Christi, Texas market. USICTA claims it has not provided the name of its member because its Executive Director, Eleanor Calimari, has been threatened and harrassed in connection with these proceedings and thus, it should not be required to submit the names, addresses and signatures of other members who wish to avoid the same reprisals. USICTA stated its intention to file the original affidavit separately with a request for confidentiality.

9. The affidavit submitted by USICTA fails to comply with Section 309(d)(1) of the Act because it has not given the affiant's name, address or signature, nor has USICTA established that the affiant would be subject to the type of threats of physical violence or reprisals tthat might countenance their failure to submit the required information. Finally, USICTA has not submitted the original affidavit with a request of confidentiality. USICTA's failure to file an acceptable affidavit by the member upon whom it relies to establish standing is a fatal defect which prevents our consideration of its Petition to Deny. Nevertheless, we will address USICTA's claims because they raise issues that should be addressed at this time.

FOR-PROFIT SALES OF CONSTRUCTION PERMITS

10. USICTA argues that the Commission's interpretations of Sections 301 and 304 of the Act[4] preclude the for-profit sale of the Corpus Christi non-wireline cellular construction permit contemplated by the captioned transfer. Specifically, USICTA claims that the Commission's interpretations of Section 301 and 304 of the Act, as set forth in *Amendment of Section 73. 3597 of the Commission's Broadcast Rules*, 52 Rad. Reg. 2d (P&F) 1081, 1989 (1982)(*Broadcast R & O)* and in *Instructional Television Fixed Service*, 94 FCC 2d 1203, 1261-62 (1983)(*MDS Reallocation),* indicate that a permittee's *intent* is not controlling in determining the scope of Sections 301 and 304, but rather, it is the *act* of profiting on the sale of a bare permit that the statute prohibits. Petition at 3.

11. Initially, we note that the Commission has acknowledged the interpretative nature of its pronouncements about the standards in Section 301 and 304. When modifying the mobile services trafficking rule in 1983 the Commission observed:

> In reaching a determination to allow the transfer of construction permits in some circumstances, we recognize that prior Commission rulings have stated that any sale of a bare license or permit for profit is prohibited by Sections 301 and 304 of the Act . . . [W]e may review that inter- pretation of the Act in future . . . .

PMRS, 95 FCC 2d at 800-01 n. 31, *recon.*, 101 FCC 2d 799 (1985), *further recon.*, 2 FCC Rcd. 1798 (1987).

12. In *MDS Reallocation*, the Commission promulgated Section 21.40 of the Rules in specific reliance upon the *Broadcast R & O*, and fully cognizant of the Commission's interpretation in the *Broadcast R&O* that a construction permit does not confer a property right under Sections 301 and 304 of the Act. Nonetheless, Section 21.40 permits, in the Commission's discretion, a for-profit sale where the Commission determines that the applicant's primary purpose in acquiring the authorization was not to sell the permit for a profit. Thus, the plain language of Section 21.40 indicates that the Commission does not interpret Sections 301 and 304 of the Act as USICTA claims it does. We further note that if such a strict interpretation of 301 and 304 were required, the Commission would not have permitted any profit, regardless of how incidental the amount, to inure from either the trade of cellular construction permits where cash is included to make up the difference in value, *see Cellular Lottery Order*, 98 FCC 2d 175, 217 n. 113 (1984), or the sale of a construction permit involving paging stations at 35, 43 and 900 MHz, *see Public Mobile Radio Services*, 95 FCC 2d 769, 800 (1983), *recon.* 101 FCC 2d 799 (1985), *further recon.*, 2 FCC Rcd 1798 (1987)(*PMRS)* (allowing bare permits to be sold for a profit because of market conditions).

13. The Commission also promulgated Section 22.40(b) of the Rules to permit transfers of construction permits, in the Commission's discretion, based on virtually the same showing as that permitted by Section 21.40 of the Rules, that is the transferor did not intend to speculate in cellular licenses. There is no provision in either rule requiring any inquiry into the extent of profit derived once it has been determined that for-profit sale was not the intent of the application. Further, the Common Carrier Bureau clearly concluded in the *Madison Decision* that, as long as the transferor has made this showing, the extent of profit is irrelevant.[5]

Section 22. 40 (b) of the Rules

14. USICTA argues that the for-profit sale of the Corpus Christi non-wireline cellular construction permit is prohibited by Section 22.40(b) of the Rules because the mere incidence of profit evidences an objective intent to speculate in cellular licenses, which, it claims, the rule prohibits.[6] USICTA further argues that inasmuch as the Common Carrier Bureau's *Madison Decision* only requires a transferor to show that his subjective intent was to construct rather than speculate, the decision should be overturned as contrary to Sections 301 and 304 of the Act.

15. As discussed *supra* at paras 9-12, the Commission has interpreted Sections 301 and 304 of the Act so as to give it discretion to permit an applicant to demonstrate that his original intent was to construct a cellular system. Indeed, the plain language of Sections 22.40(b) and 21.40 makes it clear that the Commission could permit a for-profit transfer of a construction permit in certain circumstances. However, under the petitioner's interpretation of Section 22.40(b) of the Rules, a transferor seeking to profit from the sale of a construction permit would never be able to meet its burden of showing that it did not intend to speculate. The mere fact that the transferor would derive a profit from the sale would establish an objective intent to speculate. Such a construction of either Section 22.40(b) or Section 21.40 of the Rules would render their promulgation superfluous. Therefore, we find that petitioner's interpretation of Section 22.40(b) of the Rules is incorrect. Moreover, the Common Carrier Bureau interpreted Section 22.40(b) in the *Madison Decision* to only require that the transferor to show that his subjective intent was to construct rather than speculate. We find that the *Madison Decision* is controlling in the case before us.

CCCTC's 22.40 (b) Showing

16. USICTA next argues that CCCTC has not met its burden of proof under Section 22.40(b) to demonstrate that it did not intend to speculate. Like the transferor in the *Madison Decision*, CCCTC submitted declarations from its partners which demonstrate that they were *bona fide* applicants with the requisite intent and independent ability to construct and operate the proposed system, but that the extraordinary and unanticipated turn of events - the flood of Round IV applications and changed cellular radio market - caused them to reappraise their decision to construct and operate the facility. *See Madison Decision*, 2 FCC Rcd at 5398. Thus, we find that CCCTC has met its burden of proof under Section 22.40(b).

Public Interest Showing Under 22.13 (a) (4)

17. USICTA argues that McCaw's technical and economic assertions, that the regional cellular networks McCaw proposes to build will be superior to any "stand-alone" systems, are not specific enough to meet the public interest showing required by Section 22.13(a)(4) of the Rules.[7] We disagree.

18. We have previously noted, with respect to Section 22.13(a)(4) of the Rules, that the lottery selection process was intended to avoid lengthy, speculative and comprehensive evaluations and that an "estimate based on experience in other markets is sufficient to satisfy the public interest showing requirement." *Canaan Industries, Inc.*, 2 FCC Rcd 2490, 2491 (1987).[8] We find that the analysis of McCaw's engineering consultant, which McCaw submitted with its application, is sufficient to meet the Section 22.13(a)(4) showing that its proposed system is in the pubic interest.[9]

19. In addition to McCaw's public interest statement to the effect that regional systems, such as that proposed by McCaw here, are in the public interest, such conclusion has previously been confirmed by the Commission, by the experience of large wireline operators and by McCaw's own experience in other regional clusters nationwide. In the *Madison Decision* the efficiency gains attending regional systems were explicitly acknowledged:

> [W]e have found that . . . [non-wireline] carriers are faced with competition from a wireline carrier that is already operating a wide-area - i.e. a multi-MSA - cellular system. . . .
>
> [T]he wireline carrier can often utilize the same MTSO, marketing strategies, and personnel for both markets and thus reduce its costs dramatically (since the expense of serving the additional MSA(s) is incremental) while at the same time reaping the benefits of operating an integrated system serving a much broader area.

Madison Decision, 2 FCC Rcd at para. 3 (footnote omitted). *See also Telocator Network of America*, FCC 85-508 (September 17, 1985) at paras. 8-9 (in which the Commission acknowledged that effective competition with the wireline carrier will require a unified efficient cellular enterprise.)

20. Accordingly, we find that McCaw has provided the public interest showing required by Section 22.13(a)(4) of the Rules.

FINANCIAL QUALIFICATIONS

21. USICTA argues that McCaw has not demonstrated its financial ability to construct and operate the proposed station as required by Section 22.917 of the Rules.[10] Specifically, it argues that because McCaw's commitment letter from Provident National Bank (PNB Letter) indicates it will function as the lead bank in a syndicate, and because the amount of the proposed loan is beyond the limits of the lead bank, the mere commitment of the lead bank is not enough to provide reasonable assurance.

22. After reviewing the relevant precedent, the Common Carrier Bureau indicated in *Intercontinental Communications/Cellular, Inc.*, 2 FCC Rcd 3931, 3932 (1987), that the "evidentiary standards for satisfying the reasonable assurance test are not clearly enunciated for correspondent banks." The Bureau noted cases which had determined that "a reasonable assurance existed under Section 22.917 for proposed loan syndications [relying] solely on the representations of the lead bank confirming the agreement of other banks to participate in the loan and [which] appeared not to require commitment letters from them." *See id.* at 3933 n. 13. The Bureau also noted cases finding no reasonable assurance where the letter from the lead bank provided no commitment letters from the participating institutions. *See id.* at 3932 (citing *Advanced Mobile Phone Service, Inc. (Philadelphia)*, 52 Rad. Reg. 2d (P&F) 1593, 1597 (1983); *CBS, Inc.*, 49 FCC 2d 1214, 1229 (Rev. Bd. 1984); and *KIST Corporation*, 99 FCC 2d 173, 178 (Rev. Bd. 1984). However, no case was cited that specifically required commitment letters from correspondent banks to demonstrate their willingness to participate in a loan syndication. Indeed, this issue was not resolved in *Intercontinental*. The Bureau merely stated that given the uncertainty of the law, it would accept the applicant's amendment submitting commitment letters from the participating banks because "the additional letters serve to clarify the present firm intention of both [the lead bank] to make the loan and of the correspondent banks to participate in it . . " *Id.* at 3932. Thus, we did not specifically require such letters, but did indicate that the additional information was helpful in assessing the applicant's financial qualifications.

23. McCaw has submitted an affidavit from one of its officers indicating that PNB, as the lead bank in a syndicate including ten other banks listed in the affidavit, and McCaw closed on the loan on December 24, 1987, and that the credit arrangements are now available to McCaw for use in this proposed transaction. We will accept this affidavit because, like the amendment in *Intercontinental*, it serves to clarify the intentions of both the lead bank. We find that the affidavit, together with the PNB Letter, provides the requisite reasonable assurance.[11]

Anti-Competitive Practices - Character Qualifications

24. USICTA argues that McCaw does not possess the character qualifications to become a Commission permittee for the Corpus Christi market because it engaged in anti-competitive practices designed to coerce the Chico, California non-wireline permittee to sell its permit to McCaw.

25. To support its claim that McCaw attempted to force the Chico, California non-wireline permittee to sell its stand-alone system by threatening not to cooperate with it, USICTA submitted the declaration of Austin Petersen, a majority shareholder in the Chico, California non-wireline permittee. The declaration, dated December 27, 1987, in-

dicated Petersen's belief that McCaw would be unwilling to enter into hand-off agreements with the Chico operator once its system is built. In a subsequent "Declaration under Penalty of Perjury," Mr. Petersen states, "I strongly disagree . . . with USICTA's conclusion that McCaw lacks the requisite character qualifications to be a Commission licensee." Mr. Petersen states further that, "I have been in contact with McCaw's representatives and believe that, at the appropriate time, mutually beneficial hand-off and other cooperative arrangements will come into effect between the Chico system and adjacent McCaw markets - if for no other reason because it is good business for both parties." *See* Exhibit B of Opposition to Deny Application for Transfer of Control in William M. Ryan, File No. 00497-CL-TC-1-8, filed March 21, 1988. In response, McCaw submitted a declaration by John E. McCaw, Jr. indicating McCaw's intent to cooperate with the Chico operator.

26. USICTA cites two cases to support its proposition that McCaw has engaged in anti-competitive conduct in violation of Section 314 of the Act.[12] No violation of Section 314 of the Act was alleged in either case cited by petitioner. In *Turner Communications Corporation*, 42 Rad. Reg. 2d (P&F) 1315, 1321 (1978), Turner, a licensee in Chattanooga, Tennessee, in order to coerce another station owner in Orlando, Florida into selling its station to Turner, purchased the station's transmitter site, rented it to the station owner for an exorbitant fee, and purchased a large judgment debt from the station's creditor, initiating involuntary dissolution proceedings against the station owner. The Commission determined that this conduct by Turner did not demonstrate a lack of basic character qualifications since "he might well have not perceived or appreciated [the conduct's] undesirable consequences..." and "the conduct appear[ed] to be an isolated incident." USICTA alleges far less coercive conduct in the case *sub judice* than that alleged in *Turner* and USICTA has failed to produce any evidence to suggest that McCaw's alleged conduct in Chico is anything but an isolated event.

27. In the second case cited by USICTA, *National Broadcasting Company*, 2 Rad. Reg. 2d (P&F) 921 (1964), the Commission ordered a licensee to return a station it had acquired after finding that the licensee had used its power to grant or withhold network affiliation agreements to coerce another licensee into exchanging its Philadelphia station for a Cleveland station. However, unlike the situtation in *National Broadcasting*, in which NBC had in fact acquired the Philadelphia station by withholding network affiliation, McCaw has not withheld interconnection or acquired the Chico system.

28. Thus, we find based on the facts now before us that McCaw possesses the basic character qualifiations to remain a Commission licensee. We wish to make it clear that we do not preclude the possibility of exploring this matter further should McCaw file an application to acquire the Chico permit.

ORDERING PARAGRAPHS

29. Accordingly, IT IS ORDERED, that the application filed by Corpus Christi Cellular Telephone Company, seeking consent to the transfer of control of its facilities to McCaw Communications of Texas, Inc., IS GRANTED.

30. This Order is issued under Section 0.291 of the Commission's Rules and is effective immediately. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order. *See* 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division

FOOTNOTES

[1] We note that USICTA's affidavit was submitted well beyond the date required by our Rules for their submission, which is the date the petition is filed. Late-filed affidavits submitted in a reply have been held to be acceptable *nunc pro tunc*. *See KQED, Inc.*, 88 FCC 2d 1159, 1166-67 (1982). However, we find this affidavit unacceptable for other reasons stated *infra* at para. 8.

[2] Section 309(d)(1) provides in pertinent part:

> (a)ny party in interest may file with the Commission a petition to deny any application . . . . The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of person or persons with personal knowledge thereof. . . .

[3] Section 22.30(a)(3) provides that petitions to deny must:

> (c)ontain specific allegations of fact which, except for facts of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof and which shall be sufficient to demonstrate that the petitioner . . . is a party in interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest . . . .

[4] Section 301 of the Act provides in pertinent part as follows:

> It is the purpose of this Act, . . . to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and period of the license.
>
> 47 U.S.C. Section 301 (1982).

Section 304 of the Act provides in pertinent part as follows:

> No station license shall be granted by the Commission until the applicant therefore shall have signed a waiver of any claim to the use of any particular frequency or of the electro- magnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.
>
> 47 U.S.C. Section 304 (1982).

[5] Contrary to USICTA's claim in its petition at 7 n. 3, there is no statutory prohibition of for-profit sales *per se*.

[6] Section 22.40(b) of the Rules provides: "The sale of a cellular construction permit will only be permitted after a showing that the transferor is not speculating in cellular licenses. The burden of proof is on the transferor."

[7] Section 22.13(a)(4) of the Rules provides that:

> Each application for a radio station authorization or for consent to assignment or transfer of control shall:
>
> (4) State specifically the reasons why a grant of the proposal would serve the public interest, convenience, and necessity.

[8] In stating this standard, we were referring specifically to the rule's requirement of a public need showing, but find that the standard applies equally to the general requirement of a public interest showing.

[9] Both parties have submitted affidavits from persons with experience and training in the telecommunications engineering field to support or oppose the benefits of regional systems.

[10] Former Section 22.917(e) of the Rules provided in pertinent part that:

> The following additional information shall be submitted on any form of intended credit arrangement or equity placement: (l) The details of any loan or other form of credit arrangement intended to be utilized to finance the proposed construction, acquisition, or operation of the requested facilities including such information as the identity of the creditor . . . letters of commitment, [and] terms of the transaction.
>
> Effective January 17, 1986, the requirement for additional information on credit arragements and equity placements applies only to cellular markets 1-120. The new section number for this provision is Section 22.917(a)(3)(iii).

[11] Moreover, it is well-established that we may determine an applicant's financial qualifications at the time the grant is made. *See Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980); and *Bluegrass* Broadcasting Co. Inc., 2 FCC Rcd 439 (1987). We find McCaw to be financially qualified.

[12] Section 314 of the Act prohibits licensees from engaging in conduct which may "substantially lessen competition or . . . restrain commerce . . . . " 47 U.S.C. Section 314 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-488

In the Matter of

Amendment of Section 73.202(b), RM-5537
Table of Allotments,
FM Broadcast Stations.
(Paradise, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making* issued herein, 2 FCC Rcd 743 (1987), in response to a petition filed on behalf of JIBO Broadcasting Corporation (petitioner), seeking the substitution of Channel 278B1 for Channel 224A at Paradise, California, and modification of the license for Station KRIJ(FM) (Channel 224A), accordingly, to specify operation on the higher class channel.[1] Petitioner filed supporting comments reaffirming its intentions. No other comments were received.

2. We believe the public interest would be served by the proposal since it could provide Paradise with its first wide coverage area FM service.

3. Although the *Notice* herein specified a site restriction 6.0 kilometers (3.7 miles) north[2] of the community to avoid short spacing to Channel 278A at Sacramento, California, [3] eight of twenty-seven applications subsequently tendered therefor are short spaced to the instant proposal.[4] As a result, a staff engineering analysis was undertaken to determine whether an alternate Class A channel could be substituted at Sacramento to accommodate all applicant sites. We also reviewed the possibility of other channels adjacent to the Paradise proposal. However, neither of those options were viable. However, we did determine that by imposing an additional 7.1 kilometer site restriction on Channel 278B1 at Paradise,[5] the conflicts could be eliminated.[6] In the event the conflicting applications at Sacramento are ultimately dismissed or a non-conficting applicant should become the permittee, the site restriction at Paradise could be adjusted accordingly. We believe our determination is clearly preferable since the petitioner must relocate from its present site in any event to accommodate its upgrade plans. Moreover, in this manner, the Commission's orderly administrative processes may continue without undue disruption to the Sacramento applicants.

4. In consideration of the above, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the Class A license of Station KRIJ(FM) to specify operation of Channel 278B1, in lieu of Channel 224A, at Paradise, California.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Paradise, California, as follows:

City	Channel No.
Paradise, California	244A, 278B1

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KRIG(FM), Paradise, California, IS MODIFIED, effective **May 16, 1988,** to specify operation on Channel 278B1 in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this Order by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to JIBO Broadcasting Corporation, 6177 Skyway, Paradise, CA 95969, and to KRIJ Partners, 9039 Soquel Dr., Aptos, CA 95003; and by regular mail to petitioner's counsel, James J. McGillan and Barry J. Fleishman, Esqs., Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson and Casey, 1120 Connecticut Ave., N.W., Washington, D.C. 20036.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] An application for voluntary assignment of the license of Station KRIJ(FM) to KRIJ Partners (BALH-870928HX) was granted November 27, 1987. Thus, we will also serve a copy of this *Order* on the assignee.

[2] Reference coordinates at that site are: 39-49-23; 121-38-05.

[3] Channel 278A was allotted to Sacramento in MM Docket No. 84-231, and was the 36th channel randomly selected to determine its sequential order in the application processing line.

[4] One of those applications (871110MO) was returned on December 18, 1987.

[5] Reference coordinates of the revised site restriction on Channel 278B1 at Paradise are as follows: 39-53-15; 121-36-16.

[6] The imposition of an additional site restriction on the proponent vis-a-vis requiring amendatory applications at Sacramento is distinguishable from our recent decision in *Bella Vista, Arkansas*, 52 FR 48438 (1987). Although that proposal also met the reference coordinates to an adjacent channel allotted to Mt. Vernon, Missouri, it was short spaced to one of two applications subsequently filed therefor. The affected channels were allotted to each community in MM Docket No. 84-231. No other channels were found to be available to either community nor was a further site restriction possible at Bella Vista to overcome the conflict. However, we determined that a conforming site was available to the affected Mt. Vernon applicant and thus, it was required to amend its application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-202

In the Matter of

Amendment of Section 73.202(b), RM-5701
Table of Allotments,
FM Broadcast Stations.
(Georgetown, South Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 23, 1988; Released: April 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Ocean Communications, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 3557 (1987), proposing the substitution of Channel 252C2 for Channel 249A at Georgetown, South Carolina, and the modification of its license for Station WGMB to specify operation on the higher powered channel. Comments were filed by the petitioner, Davidson Communications, Inc. (Davidson), licensee of Station WWKT-FM, Kingstree, South Carolina, and Joseph Papp, III (Papp). Reply comments were filed by the petitioner and Papp.

2. As stated in the *Notice*, Channel 252C2 can be allocated to Georgetown in compliance with the Commission's minimum distance separation requirements contingent upon a related proceeding proposing the substitution of Channel 255C2 for Channel 252A at Kingstree, South Carolina (MM Docket No. 87-80). In addition, the *Notice* pointed out that the Commission has before it a request filed by Charleston County Wireless Co. (Charleston County), permittee of Station WCCG, Folly Beach, South Carolina. Charleston County requests the allocation of Channel 251C2 to Folly Beach if Station WGMB at Georgetown remains on Channel 249A and alternatively requests the allocation of Channel 249C2 to Folly Beach if Station WGMB is modified to Channel 252C2. The *Notice* stated that the allotment of Channel 251C2 to Folly Beach might not be dependent upon the denial of petitioner's upgrade at Georgetown. Rather, we noted that while the allotment of Channel 252C2 to Georgetown without a site restriction would create a prohibited short-spacing to Channel 251C2 at Folly Beach, the channel could be allocated to Folly Beach if Channel 252C2 were allocated to Georgetown with a site restriction of 23.8 kilometers northeast.

3. In its comments, petitioner reiterates its desire to upgrade Station WGMB to operate on Channel 252C2, and urges its allotment without a site restriction. Rather than allocate Channel 252C2 to Georgetown with a site restriction to permit the allocation of Channel 251C2 to Folly Beach, petitioner proposes instead the allotment of Channel 249C2 to Georgetown, which would not require a site restriction. It states that operation as a Class C2 would permit it to increase its service from its present 32,323 persons within 564 square miles to 127,620 persons within 2245 square miles. It points out that the permanent population of Georgetown has increased from 10,449 persons in 1970 to 10,864 persons in 1984 and that Georgetown County has increased from 33,500 in 1970 to 46,500 in 1985. In addition, according to petitioner, the population of the Georgetown area doubles during the summer due to the influx of tourists. Petitioner also states that the Commission recently recognized the need for expanded radio service in the area with the recent upgrading of Station WAZX at Georgetown from Channel 292A to Channel 293C2 (MM Docket 86-371, 2 FCC Rcd 2804 (1987)). Davidson also supports the substitution at Georgetown, stating that such an allocation would enable Station WGMB to expand its coverage of the community and the outlying rural areas.

4. Papp notes that its counterproposal in the Kingstree proceeding to allocate Channel 255C2 to McClellanville, South Carolina, is mutually exclusive with the proposed Channel 252C2 at Georgetown since the Commission's minimum distance separation requirements stipulate a 36 mile separation between third adjacent Class C2 allotments while the two communities are only 25 miles apart. It argues, however, that a Section 307(b) comparison of these proposals reveals that the provision of a first local service to McClellanville is superior to the upgrading of the existing service at Georgetown. In his reply comments, Papp supports petitioner's alternate Channel 249C2 proposal for Georgetown since it does not conflict with his proposal for Channel 255C2 at McClellanville.

5. By *Report and Order* in MM Docket 87-80, adopted this date, the Commission denied the substitution at Kingstree and instead allocated Channel 255C2 to McClellanville, South Carolina, as the community's first local FM service. Rather than include Georgetown's request for Channel 252C2 in the Kingstree-McClellanville proceeding, we have confirmed that Channel 249C2 can be allocated to Georgetown in compliance with the Commission's minimum distance separation requirments at Station WGMB's current transmitter site.[1] While this allotment conflicts with the present allotment of Channel 249A at Folly Beach, South Carolina, we have on this date substituted Channel 251C2 for the Class A there. *See* MM Docket No. 87-203. Based on the record before us, we believe that the public interest would be served by substituting Channel 249C2 for Channel 249A at Georgetown since it could enable the provision of expanded radio service by Station WGMB to Georgetown and its environs. As proposed in the *Notice*, we shall also modify the license of Station WGMB to specify operation on Channel 249C2.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Georgetown, South Carolina	229A, 249C2, 293C2

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Ocean Communications, Inc., for Station WGMB, Georgetown, South Carolina, IS MODIFIED effective **May 16, 1988,** to specify operation on Channel 249C2, in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are: North Latitude 33o, 25', 58"; West Longitude 79o, 16', 16".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-263

In the Matter of

Amendment of Section 73.202(b), RM-5676
Table of Allotments,
FM Broadcast Stations.
(Biddeford, Maine)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 8, 1988; Released: April 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission is the *Notice of Proposed Rule Making*, 2 FCC Rcd. 4326 (1987), proposing the substitution of FM Channel 232B1 for Channel 232A at Biddeford, Maine, in response to a petition filed by WYJY, Inc. Petitioner also requested modification of its license for Station WYJY-FM to specify operation on Channel 232B1 in lieu of Channel 232A. Comments were filed by the petitioner reaffirming its interest in Channel 232B1.[1] A Motion for Extension of Time was filed by Ardman Broadcasting Corporation of Massachusetts (Ardman), licensee of FM Station WZOU, Boston, Massachusetts.[2] Preliminary comments were also filed by Ardman. Gold Coast Broadcasting, Inc. filed a joint Motion to Strike and Opposition to Motion for Extension of Time. Reply comments were filed by Ardman and Gold Coast Broadcasting.

2. Ardman, licensee of FM Station WZOU, Boston, Massachusetts, requested an extension of time for filing comments on September 11, 1987. According to Ardman, it learned of the *Notice* on September 11, 1987, and stated additional time was necessary to evaluate the proposal. Ardman indicated that the proposed substitution at Biddeford would be short spaced to Station WZOU, thus causing interference in violation of the Commission's Rules and contended it should have been served with a copy of the *Notice* as was Station WFTN-FM, Franklin, New Hampshire. [3] It should be noted that Ardman did file preliminary comments on time. Those comments reiterate the potential for harmful interference to Station WZOU from the proposed upgrade at Biddeford. In addition, Ardman states that the proposed upgrade might preclude WZOU from moving its transmitter site, if it chooses to do so at some later date.

3. In response, Gold Coast Broadcasting, Inc., licensee of WYJY(FM) and proponent of the allotment contemplated in this proceeding and Metro Management, Inc., the prospective assignee of WYJY(FM), state that neither has any intention to file an application which would be short spaced with the facilities of WZOU. Further, the assignee has purchased a parcel of land to be used as a new transmitter site for the upgraded facilities. The proposed site for the upgraded facilities of WYJY will meet all mileage spacings, including that to WZOU. Petitioner argues that Ardman's allegations are without merit and that WZOU's potential transmitter site change is of such speculative nature that it does not warrant any decisional significance.

4. We believe that the public interest would be served by substituting Channel 232B1 for Channel 232A and modifying Station WYJY's license accordingly, since it could provide a higher class channel to Biddeford. We also agree with the petitioner that the objection of Station WZOU is premature, as the Commission does not protect a station's possible new transmitter site from a rule making which proposes a new service.

5. Channel 232B1 can be allocated to Biddeford in compliance with the Commission's minimum distance separation requirements without a site restriction.[4] As requested, we shall also modify the license of Station WYJY to specify operation on Channel 232B1 in lieu of Channel 232A in accordance with Section 1.420(g) of the Rules. Since Biddeford, Maine is located within 320 kilometers (200 miles) of the common U.S.-Canadian border, concurrence of the Canadian government has been obtained.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, to read as follows:

Community	Channel No.
Biddeford, Maine	232B1

7. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Metro Management, Inc. for Station WYJY-FM, Biddeford, Maine, IS MODIFIED effective **May 16, 1988,** to specify operation on Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] An application for assignment of license of WYJY to Metro-Management, Inc. was granted on September 15, 1987 (BALH 870716IG).

[2] An *Order* denying the request for extension of time to file comments was adopted on September 22, 1987 (DA 87-1391).

[3] The *Notice* stated that if Station WYJY used its current site, a short spacing would result to Statio WZOU, Boston, Massachusetts. However, using city reference coordinates for Biddeford, there is no short spacing to Station WZOU. Thus, the *Notice* proposed the upgrade with no short spacing and there was no need to serve Station WZOU.

[4] The city reference coordinates for Biddeford are 43-29-30 and 70-27-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-230

In the Matter of

Amendment of Section 73.202(b), RM-5707
Table of Allotments,
FM Broadcast Stations.
(Georgetown, Delaware)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has under consideration the *Notice of Proposed Rule Making* 2 FCC Rcd 3942 (1987), proposing to substitute Channel 228B1 for Channel 228A at Georgetown, Delaware, at the request of Pottstown Broadcasting Company (petitioner), licensee of Station WSEA(FM), Channel 228A at Georgetown. In addition, the *Notice* proposed to modify the station license to specify Channel 228B1. Comments in support of the proposal were filed by the petitioner.[1]

2. After consideration of the proposal, we conclude that the public interest would be served by the channel substitution at Georgetown, in order to provide an increase in coverage by Station WSEA(FM). To meet the spacing requirements of Section 73.207 of the Rules, the transmitter for Channel 228B1 must be located at least 19.4 kilometers (12 miles) southeast of Georgetown, to avoid short spacing to Station WMMR(FM), Philadelphia, Pennsylvania, and Station WSTV(FM), Wilmington, Delaware.[2] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WSEA(FM) to specify operation on Channel 228B1.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below:

City	Channel No.
Georgetown, Delaware	228B1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Pottstown Broadcasting Company, IS MODIFIED, to specify operation on Channel 228B1 subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620;

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] On December 11, 1987, after the date for filing comments had ended, Michael N. Castle, Governor of Delaware, filed comments in support of the proposed upgrade.

[2] Coordinates for Channel 228B1 at the restricted site are 38,30,58 and 75,21,53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-374

In the Matter of

Amendment of Section 73.202(b), RM-5726
Table of Allotments,
FM Broadcast Stations.
(Stuart, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 2, 1988; Released: April 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 5630 (1987), which proposed to substitute Channel 224C2 for Channel 224A at Stuart, Florida, and to modify the license for Station WZZR(FM) to specify the Class C2 channel at the request of the licensee, CRB of Florida, Inc. (petitioner). The petitioner filed comments in support of the proposed substitution of channels.

2. Channel 224C2 can be allotted to Stuart in compliance with the minimum distance separation requirements. Petitioner proposes to locate the transmitter for Channel 224C2 at a site 9.2 kilometers (5.7 miles) north of the city.[1] Because the proposed transmitter site for Station WZZR(FM) is located within 80 kilometers (with ERP of more than 25 KW) of the Federal Communications Commission's monitoring station at Vero Beach, Florida, the licensee should refer to the provisions of Station 73.1030(c) of the Rules governing protection of Federal Communications Monitoring Stations when filing its application.

3. We believe that the public interest would be served by substituting Channel 224C2 for Channel 224A at Stuart since it could provide the community with its first wide coverage area FM service. As proposed, we shall modify petitioner's license for Station WZZR(FM) to specify operation on Channel 224C2.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Stuart, Florida	224C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of CRB of Florida, Inc., Station WZZR(FM), Stuart, Florida, IS MODIFIED effective **May 16, 1988**to specify operation on Channel 224C2 in lieu of Channel 224A at Stuart, Florida, subject to the following conditions:

(a) Within 90 days of the effective date of *this Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620;

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 224C2 at the restricted site are 27,16,32 and 80,17,11.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-365

In the Matter of

Amendment of Section 73.202(b), RM-5777
Table of Allotments,
FM Broadcast Stations.
(Pella, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 4, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of GBA, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 5612 (1987), proposing the substitution of Channel 277C for Channel 277C1 at Pella, Iowa, and the modification of petitioner's license for Station KFMD(FM) to operate on the higher powered channel. Petitioner failed to file comments reiterating its intention to apply for use of Channel 277C, if allocated.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. Further, it is the Commission's general policy to refrain from making allotments absent such expressions of interest. Therefore, since no such continuing interest has been expressed, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of GBA, Inc. requesting the upgrading of Station KFMD(FM) at Pella, Iowa, to operate on Channel 277C, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-408

In the Matter of

Amendment of Section 73.202(b), RM-6004
Table of Allotments,
FM Broadcast Stations.
(Chillicothe, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988; Released: April 4, 1988

By the Deputy Chief, Policy and Rules:

1. At the request of Wyandot Radio Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6106 (1987), proposing the substitution of Channel 232B1 for Channel 232A at Chillicothe, Ohio, and the modification of petitioner's license for Station WFCB-FM to specify the higher powered channel. Petitioner filed comments supporting the channel substitution and reiterating its intention to apply for the channel, if allocated. No other comments were received.

2. Channel 232B1 can be allocated to Chillicothe in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.6 kilometers (4.1 miles) east to avoid a short-spacing to Station WWNK-FM, Cincinnati, Ohio, and WSNY, Columbus, Ohio.[1] Canadian concurrence in the allotment has been received since Chillicothe is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by substituting Channel 232B1 for Channel 232A at Chillicothe since it could provide the community and its environs with expanded radio service. As proposed, we shall also modify petitioner's license for Station WFCB-FM to specify operation on Channel 232B1.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 16, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Chillicothe, Ohio	227B1, 232B1

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Wyandot Radio Corporation for Station WFDB-FM. Chillicothe, Ohio, IS MODIFIED effective **May 16, 1988,** to specify operation on Channel 232B1, in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Chillicothe are: North Latitude 39o, 20', 23", West Longitude 82o, 54', 18".

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-552

In the Matter of

Amendment of Parts 2, 73, 74 and 78
of the Commission's Rules to relax
the equipment authorization procedures

ERRATUM

Released: March 29, 1988

This document corrects the dates on which comments and reply comments are due in the Notice of Proposed Rule Making (FCC 87-376) in the captioned proceeding. The correct dates are May 6, 1988 and May 26, 1988, respectively.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-141

In the Matter of

Amendment of Section 73.202(b), RM-6030
Table of Allotments,
FM Broadcast Stations.
(Spring Grove, Minnesota and
Mason City, Iowa)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: March 16, 1988; Released: April 1, 1988

By the Chief, Allocations Branch:

1. Before the Commission is a rule making filed by Sun Communications, Inc. (petitioner), requesting the substitution of FM Channel 252C2 for Channel 252A at Spring Grove, Minnesota. Petitioner also requests modification of its license for Station KQYB, to specify operation on the higher class channel.

2. Channel 252C2 can be allocated to Spring Grove, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 252A is deleted from Mason City, Iowa.[1] Channel 252A is presently licensed to Station KCMR. Petitioner has proposed the substitution of FM Channel 250A for 252A at Mason City. The proposed substitution at Mason City can be accomplished in compliance with the minimum distance separation requirements at the site coordinates for Station KCMR. It is also necessary to impose a site restriction 15.2 kilometers (9.4 miles) northwest on Channel 252C2 at Spring Grove, Minnesota. The site restriction will prevent a conflict with an application filed by Station KHAK-FM, Channel 251C, Cedar Rapids, Iowa, and with a construction permit for Station WVCX, Channel 255C, Tomah, Wisconsin. We shall propose to modify the license of Station KQYB, Channel 252A, to specify operation on FM Channel 252C2, in accordance with Section 1.420(g) of the Commission's Rules.

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require the proponent of the new allotment to make a commitment that it will reimburse the affected station for the costs incurred in changing frequencies. Petitioner has stated that it understands that it would be its responsibility to reimburse Station KCMR for the reasonable costs in changing frequency.

4. In order to provide a wide coverage area station for the Spring Grove, Minnesota area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
Community	Present	Proposed
Mason City, Iowa	228A, 252A, 291C1	228A, 250A, 291C1
Spring Grove, Minnesota	252A	252C2

5. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, TLC Broadcasting Corp., the licensee of Station KCMR, Mason City, Iowa, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 250A in lieu of Channel 252A.

6. Pursuant to Section 1.87 of the Commission's Rules, TLC Broadcasting Corp. may, not later than **May 23, 1988,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on TLC Broadcasting Corp. to furnish additional information. If TLC Broadcasting Corp. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, TLC Broadcasting Corp. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

TLC Broadcasting Corp.
Box 979
216 Second Street, N.E.
Mason City, Iowa 50401-0979

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **May 23, 1988,** and reply comments on or before **June 6, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Samuel Miller
Miller and Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel for the petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates used for this proposal are as follows: Spring Grove, Minnesota 43-40-37; 91-44-14 Mason City, Iowa 43-07-18; 93-11-32.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

CAROLINA CHRISTIAN BROADCASTING, INC.

For Renewal of License of Station WGGS-TV Greenville, South Carolina — File No. 860731KM

For Renewal of License of Station WGSE(TV) Myrtle Beach, South Carolina — File No. 860731KI

For Renewal of License of Station WCCT-TV Columbia, South Carolina — File No. 860731KL

CENTRAL CAROLINA TELEVISION, INC.

For Renewal of License of Station WKFT(TV) Fayetteville, North Carolina — File No. 860801KI

PARK COMMUNICATIONS, INC.

For Renewal of License of Station WNCT-TV Greenville, North Carolina — File No. 860801KN

MEMORANDUM OPINION AND ORDER

Adopted: February 25, 1988; Released: April 4, 1988

BY THE COMMISSION:

1. The Commission has before it for consideration: (i) "Petition to Deny" filed November 3, 1986 by the National Black Media Coalition (hereinafter NBMC or Petitioner)[1] against the captioned license renewal applications;[2] (ii) opposition pleadings from the licensees; (iii) petitioner's reply; and (iv) various related pleadings.[3]

2. *PROCEDURAL MATTERS.* With respect to standing, the petitioner has submitted statements from members who are local residents[4] of the service areas of Stations WKFT(TV), WGGS-TV, WGSE(TV) and WCCT-TV. Although the statements were not timely filed, we find that the late submissions were not intended to abuse the processes of the Commission.[5] We therefore accept the late-filed statements *nunc pro tunc*, *Malrite of New York*, 71 F.C.C. 2d 241, 242 (1979), and consider NBMC's challenge as a petition to deny against the stations other than WNCT-TV.[6] With respect to WNCT-TV, NBMC failed to submit an affidavit or statement from a viewer or resident of the WNCT-TV service area.[7] Accordingly, the renewal challenge against WNCT-TV will be treated as an informal objection.

3. *PLEADINGS.* The petitioner charges that the employment profiles and EEO programs of each of the challenged stations indicate that the licensees have not complied with the Commission's EEO rule (Section 73.2080) or policies with respect to Blacks. The petitioner contends that the licensees engaged in "tokenism" in their employment of Blacks and maintains that the EEO programs submitted by the licensees fail to acknowledge deficiencies in the previous license term or propose measures to correct these deficiencies. With respect to Carolina Christian Broadcasting Inc., the petitioner contends that the licensee's description of the three stations' EEO programs are identical and boilerplate even though stations WGGS-TV and WGSE(TV) failed to meet the Commission's processing guidelines. Moreover, the petitioner maintains that the licensee of the three stations fails to hire Blacks in the capacity of Officials or Managers. With respect to Station WKFT(TV), the petitioner maintains that the ineffectiveness of the station's EEO program is evidenced by the lack of on-air minority personalities and the licensee's last-minute hiring of Blacks during the last year of the license term. Lastly, the petitioner contends that, while the amended EEO program proposed by the licensee of Station WNCT-TV includes corrective measures, the amended program is insufficient to rebut the inference that discrimination may have occurred in connection with the decline in minority employment during the 1981-1986 license term.[8] The petitioner, therefore, requests the Commission to investigate the EEO practices of the challenged stations pursuant to *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) ;[9] designate their applications for hearing; and deny each of the applications.

4. The licensees maintain that the petitioner has failed to establish, by *prima facie* evidence, discrimination or noncompliance with the Commission's policies on the part of the licensees. The licensees, therefore, request renewal of the licenses.

5. *DISCUSSION.* Section 73.2080 of the Commission's Rules requires that broadcast licensees refrain from employment discrimination as well as establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. The Commission evaluates the licensee's efforts to implement its affirmative action program by reviewing all relevant and material information available, including the composition of the station's workforce, the composition of the local labor force, the description of the station's EEO program and policies including recruitment and promotion data, and any EEO complaints filed against the station or licensee. In reviewing the station's employment profile, the Commission compares the station's workforce with the area's available labor force. Although all EEO programs are reviewed, a closer look is generally given to those stations not meeting the Commission's internal processing guidelines.[10] The numbers and percentages are simply analytical aids, however, and are not determinative. As emphasized above, in the absence of evidence of discrimination, our primary concern is the broadcaster's efforts. Thus, it would be an error for a broadcaster to assume it has reached a "safe harbor" once it meets the guidelines. Every broadcaster is required to make affirmative efforts and to refrain from discrimina-

tion. When the evidentiary record indicates that the licensee is complying with our EEO rule and policies, the pending application is granted, if otherwise appropriate. When the evidence indicates noncompliance by the licensee, the Commission may impose prospective sanctions such as the submission of periodic progress reports and/or renewal for less than a full term.[11] For less serious cases, the Commission may in its discretion simply issue warnings.

6. Applying the foregoing principles, we have evaluated the stations' EEO efforts in light of their submissions, and the arguments raised by the petitioner. With one exception, we find that the licensees have complied with our EEO rule and policies during the license term and that no further inquiry or sanction is warranted.[12]

(a) WGGS-TV, Greenville, South Carolina

Review of the WGGS-TV EEO program indicates that the station contacted several organizations for referrals, including the NAACP (1 referral), the Greenville Urban League (0 referrals), the Sunbelt Human Resources (1 referral), and two local technical colleges with a substantial minority presence (12 referrals). Of the 13 new hires during the reporting period, one was Black. With respect to the station's on-the-job training program, no Blacks participated during the reporting period. However, the licensee states that Blacks have received on-the-job training in the past, and we are presented with no evidence of Blacks who sought but were denied training during this period. Blacks comprise 14.8%[13] of the Greenville MSA labor force. The WGGS-TV renewal application employment report reflects that the station employed 29 persons full-time, including two (6.9%) Blacks, and 23 persons in the upper-four categories, including two (8.7%) Blacks. Earlier license term reports reflect similar data.

NBMC charges that the licensee misrepresented its contacts with the NAACP and Urban League, based on letters from those organizations stating that they had no record of a recruitment contact from the licensee. With respect to the station's EEO efforts, NBMC faults the licensee for not listing Black schools or media as sources of potential applicants. However, NBMC does not refer to any specific organizations that the licensee could have used but did not use in the reporting period. *Louisiana / Mississippi Broadcast Stations*, 94 F.C.C. 2d 275, 280 (1983). In opposition, the licensee argues that it contacted the NAACP via a general member, Mrs. Lottie Gibson, rather than the local branch and it notes that its efforts resulted in a referral. Moreover, Mrs. Gibson wrote on behalf of the station, saying: "I have known the present management for more than twenty years and have worked with him on many committees and programs . . . he has communicated to me the problem [sic] various employees leaving the station . . . and sought my reference for replacement [of departing station staff] from the black community . . . [the station] sought to provide equal employment opportunities for all people." With respect to the Urban League, the licensee acknowledges that its contacts were not well-documented. However, it produced an affidavit from the station manager that at least one recruitment contact with the Urban League was made during the reporting period.

Considering the nature of the dispute and the materials submitted (licensee affidavits versus unverified letters), we do not believe a substantial and material question of fact is raised. We reiterate, however, that the licensee should seek qualified minority applicants for each opening and take greater care in documenting its recruitment contacts, so that it can assess the success of its efforts and make adjustments as warranted.

(b) WGSE(TV), Myrtle Beach, South Carolina

Review of the EEO program indicates that the station contacted several sources for referrals, including the NAACP, a predominantly Black church, the state employment commission and two local colleges (one of which is a technical college) with significant minority enrollment.[14] Although none of these contacts resulted in referrals during the last year of the license term, a newspaper advertisement did produce referrals and the station hired a Black woman who was referred by a station employee.[15] Thus, of 11 employees hired during the reporting year, two were Black. Review of the employment reports indicate that the station's staff increased from 11 full-time employees in 1985, of whom nine held upper-level positions, to 14 full-time employees, all in upper-level positions, in 1986. Minorities comprise 19.4% of the Myrtle Beach MSA labor force (17.9% Black, 0.9% Hispanic and .6% other). Throughout this period, there was only one full-time Black technician in 1985 (representing 9.1% of the full-time staff and 11.1% of the upper-level positions) and in 1986 (representing 7.1% of both the full-time and upper-level employees).

The station's EEO program indicates that the licensee made efforts through its referral sources to attract a qualified pool of Black applicants. While these efforts have not resulted in an increase in the number of full-time Black employees, the station has hired and promoted Blacks on its part-time staff, and there are no allegations or evidence that the Blacks hired during the license term were excluded from full-time positions -- which would, of course, be a serious concern. Thus, further inquiry about this matter is not warranted. We do note, however, that all of the full-time positions are in the upper-four job categories. Accordingly, we admonish the licensee to review its job classifications to ensure proper categorization.

(c) WCCT-TV, Columbia, South Carolina

The EEO program lists several referral sources utilized during the reporting period, including the NAACP (no referrals), a local prison work release center (2 referrals, resulting in 2 hires), the state employment commission (no referrals) and two local colleges with significant Black enrollment (no referrals).[16] The EEO program also reflects that the station hired six people during the reporting period, including one Black who is in training for a technical position. In addition to the on-the-job training, the licensee conducts internship programs with the Beulah Youth Development Center and the University of South Carolina. In support of its recruitment efforts prior to the reporting period, the licensee also states that referrals from employees resulted in the hiring of two Blacks during the license term. Comparison of the station's staff with the Columbia MSA labor force of 25.8% minorities (24.1% Black, 1.0% Hispanic and 0.7% other) shows that the station employed 18 people full-time, including four (22%) Blacks, and 17 people in the top-four job classifications, of whom four (24%) were Black. Previous Annual Employment Reports show that the number of Blacks in the upper-four level job categories has increased over the last three years.

The petitioner points out that all of the station's Black employees are technicians. Citing *Carolina Radio of Durham, Inc.*, 74 F.C.C. 2d 571 (1979), the petitioner contends that the licensee's failure to hire Blacks in programming and managerial positions indicates a less than aggressive EEO program.

As we noted in *Carolina Radio, supra*, and subsequent cases, the Commission looks at a station's overall employment, including all upper-four job categories, rather than one job category, in assessing a station's EEO performance. *E. g., Miami Valley Broadcasting Corp.*, 86 F.C.C. 2d 776 (1981). Moreover, statistics are but one of many factors analyzed in determining whether a licensee has engaged in affirmative EEO efforts and has not discriminated. Considering all pertinent circumstances, such as the size of the station, the composition of the labor force, and the absence of any evidence of discriminatory placement of employees, we are satisfied that the petitioner's charge warrants no further inquiry. Finally, while we are satisfied that the licensee's recruitment efforts were not deficient, we advise that contacts with referral sources should be made often and geared toward all job openings.[17]

(d) WKFT(TV), Fayetteville, North Carolina

Review of the licensee's EEO program reveals that the station sought referrals from sources such as the NAB Minority Clearing House (2 referrals), the North Carolina Chapter of Women in Radio and Television (O referrals), the state employment service (5 referrals), and a local university[18] with significant minority enrollment (6 referrals). Of the 24 hires during the reporting year, four were Black. With respect to training opportunities, the on-the-job training program for present employees and internship programs resulted in the promotion of a part-time Black male camera operator to a full-time position as well as full-time employment of at least one intern. In addition, the licensee states that a Black male reporter was promoted from a part-time to a full-time position. The Fayetteville labor force includes 31.2% minorities (26.1% Black, 1.9% Hispanic and 3.2% Asian or Pacific Islander). Review of the 1986 Annual Employment Report shows that the 45 full-time staff members included 8 (17.7%) minorities, of whom 5 (11.1%) were Black, and that the 42 upper-level employees included 7 (16.7%) minorities, of whom 4 (9.5%) were Black.[19] Based on its performance in hiring and promoting minorities and women,[20] the licensee argues that its EEO program is an effective one. NBMC disagrees, citing a lack of on-air minority personalities and the decline of minority employment in comparison with the prior licensee. However, these claims do not raise a substantial and material question of fact in light of the licensee's overall employment record and the lack of any evidence of discrimination. *Baltimore Metropolitan Broadcast Stations*, 89 F.C.C. 2d 1183, 1187 (1982). Moreover, the Black attrition rate since the change in licensees of the station is comparable to the overall attrition rate. *See generally In re Storz*, 58 R.R. 2d 823, 824 (1985). Finally, while NBMC contends that the licensee failed to contact local minority organizations or media outlets, NBMC failed to refer to any local organizations which the licensee could have used but did not use. *Louisiana / Mississippi Broadcast Stations, supra*.

While Black employment is relatively low,[21] we note that the licensee acquired the station in July 1985. According to the licensee, approximately one-half of the employees, including one-half of the minorities, left the station's employ subsequent to the acquisition. However, the licensee subsequently made efforts to attract qualified minority applicants during its short tenure which resulted in several referrals from minority sources. Moreover, it plans to expand its outreach program during the upcoming license term. Because of these most recent efforts, we do not find a basis for concern at this time, even though the licensee is below the processing guidelines for the dominant minority.

Efforts do not necessarily result in instant success, and the licensee took over only shortly before the license term ended. What is important here is that this licensee appears to be committed to making whatever efforts that it ascertains, over the long term, work the best. There is, moreover, no evidence of discrimination necessitating further inquiry. For these reasons, we will renew WKFT(TV)'s license.

7. We believe that the following licensee has not adequately reviewed its employment processes, explained the decline in minority employment or proposed any modifications in its EEO efforts. Accordingly, we will impose reporting conditions as outlined below.

WNCT-TV, Greenville, North Carolina

Review of the EEO program indicates that the licensee contacted the local chapters of the National Organization for Women, the League of Women Voters, the NAACP, the SCLC, and the state employment commission, but received no referrals from these organizations. The station did, however, receive 20 minority referrals from newspaper advertisements. The EEO program also indicates that two area colleges referred two minorities during the reporting period, and the licensee, in its opposition, states that the two current interns from area colleges are minorities. With respect to promotions, the EEO program indicates that a Black male was promoted from Production Assistant to Assistant Director. The EEO program also reflects that the licensee provided on-the-job training for entry-level positions because most of the new employees, including eight females and one Black, had no previous broadcast experience. Review of new hires reveals that only two of the 23 employees hired during the reporting period were Black; yet, the licensee reports that an adequate number of minorities are applying for available job openings. The Greenville MSA labor force includes 29.1% minorities of whom 27.8% are Black, 0.9% are Hispanic and 0.4% are either Asian, Pacific Islander or American Indian. The station's license term employment reports show that the size of the workforce has varied between 63 and 65 full-time employees overall. Of these, the station employed 13 (20.6%) Blacks in 1982, but only seven (11.1%) Blacks as of the renewal filing. In the upper-four job categories, which varied between 55 and 57 employees, the station employed eight (15.1%) Blacks in 1982, and seven (12.7%) Blacks when the license renewal application was filed.

In view of these results, the petitioner argues that the licensee's contacts with the aforementioned organizations are not systematically geared to developing a pool of qualified Black applicants.[22] NBMC also points out that, despite the decline in minority employment at the station, the licensee's EEO program reflects neither awareness nor proposals to address the decline. In opposition, the licensee maintains that it is concerned about the decline in minority employment but believes it to be nothing more than a temporary dip which would be rectified by the

station's usual affirmative action measures. Nonetheless, the licensee states that, in conjunction with the present program, it has already begun to implement several recruitment and hiring strategies which it plans to continue "at least until minority employment at WNCT-TV reaches a significantly higher level . . . ." In reply, NBMC acknowledges that the licensee's actions are constructive but urges that a *Bilingual* inquiry[23] is still necessary to rebut an inference of intentional discrimination.

In our view, the licensee's overall EEO record does not warrant a *Bilingual* inquiry inasmuch as we have sufficient information to determine that renewal is in the public interest. The station's records reveal insufficient statistical disparity to warrant further inquiry. The station's numbers have been above or close to the processing guidelines during the majority of the license term, with the exception of the latter part of the term which was occasioned by a dip in numbers. We find the evidence insufficient to suggest intentional discrimination. Nonetheless, we are concerned with the licensee's failure to assess and modify its EEO efforts. Our EEO rules call for affirmative efforts by licensees to ensure equal employment opportunities, and our filing requirements are designed, in part, to assist the licensee in its self-assessment of its efforts. That self-assessment should be an on-going effort by the licensee, however, not a once-a-term event.

Although our focus is on the licensee's efforts, there is no magical definition of what constitutes sufficient efforts. That must be determined based on the circumstances of each case, particularly to what extent referral sources have been able to refer qualified minority and female applicants. Where a licensee has not been successful in recruiting such applicants, it should reassess and try some new and varied sources. These may include both minority sources and general equal opportunity sources. The licensee is in the best position to assess which sources are the most fruitful. Furthermore, the licensee's obligations extend to its own promotion efforts.

In the instant case, the licensee's conduct concerns us on two fronts. First, the licensee does not appear to have engaged in on-going self-assessment. Accordingly, despite a fairly substantial decline in minority employment between 1985 and 1986, the licensee took no steps to determine whether its own actions or efforts could be improved until NBMC submitted its challenge. Indeed, the licensee did not even address the decline -- or its efforts with respect thereto -- in its EEO program. We emphasize that if the licensee experienced such a decline which put it below the processing guidelines, *despite* its *best* efforts, we would nevertheless find the licensee in compliance with our EEO policy. Our concern here is the degree to which the efforts were best efforts, *i. e.*, substantial efforts under the circumstances. This is not a case where the licensee was making no or practically no efforts, but they were being made without much assessment as to their success -- or, here, their lack of success. We expect licensees to be *engaged* in their efforts.

Our second cause for concern is the licensee's statement that it will continue its newly implemented recruitment strategies until minority employment reaches a significantly higher level. Whereas the exact nature of recruitment efforts can vary over time, we wish to emphasize that we expect licensees' affirmative recruitment and promotion efforts to continue even after our processing guidelines are met. They are simply processing guidelines and no more. They are not quotas nor do they establish upper limits for minority and female employment. There is no reason for a licensee's vigorous efforts to diminish at 50%, 75% or even 90% of parity. Although it is not entirely clear that this is what the licensee meant to suggest, we remind this and all licensees that their efforts are expected to continue throughout their tenure and not just during the reporting period.

Discrimination, of course, is prohibited at any percentage. Accordingly, in order to monitor the licensee's efforts -- and its self-assessment so that it can revise its recruitment efforts as needed -- we will impose reporting conditions on WNCT-TV.[24]

8. Accordingly, IT IS ORDERED, That the petition to deny filed by the National Black Media Coalition IS DENIED; and when considered as an informal objection IS DENIED.

9. IT IS FURTHER ORDERED, That the renewal applications for Stations WGGS-TV, WGSE(TV), WCCT-TV and WKFT(TV) ARE GRANTED.

10. IT IS FURTHER ORDERED, That the license renewal application for Station WNCT-TV IS GRANTED, subject to reporting conditions. The licensee of Station WNCT-TV is directed to file an original and one copy of the following information with the Commission on May 1, 1989 and November 1, 1990 setting forth the following information for each vacancy filled:

> (a) For the May 1, 1989 report, a list of all persons hired as well as all persons who applied for each position filled during the period April 1, 1988 to March 31, 1989, and for the November 1, 1990 report, a similar list covering the period April 1, 1989 to October 31, 1990,[25] indicating the job title, full-time or part-time status, FCC Form 395 classification, the minimum job qualifications for each vacancy, the referral or recruitment source of each applicant, the qualifications of the job candidates, the date of hire, sex and race or national origin; and
>
> (b) a list of employees as of the most recent payroll period prior to the report's submission date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin; and
>
> (c) a narrative statement detailing the efforts to recruit for each position filled during the specified periods, including identification of sources used for the purpose of increasing the station's pool of Black applicants.[26]

11. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - Return Receipt Requested one copy of this Memorandum Opinion and Order to the National Black Media Coalition and to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] The National Black Media Coalition (NBMC), headquartered in Washington, D.C., is a national association of Black organizations and persons seeking additional Black employment, program service and ownership in the media. The petition was filed collectively by the national organization and members of affiliated chapters in North and South Carolina who are viewers of the challenged stations.

[2] The petitioner also challenged the license renewal applications of WJKA(TV) and WWAY(TV), both in Wilmington, North Carolina. The petitions against these stations were denied by the Chief, Mass Media Bureau, pursuant to delegated authority.

[3] Carolina Christian Broadcasting, Inc. filed a response to the petitioner's allegations of misrepresentations in the EEO programs of Stations WGGS-TV, WGSE(TV) and WCCT-TV. Central Carolina Television, Inc. filed a clarification pleading in response to the petitioner's allegation that Station WKFT(TV) lacks on-air minority personalities.

[4] Initially, the petition was supported only by a statement under penalty of perjury from Pluria Marshall, who is Chairman of the NBMC and a resident of Washington, D.C. On January 13, 1987, NBMC submitted statements from: Clinton Harris, Fayetteville, North Carolina, NBMC member and viewer of WKFT(TV); Bettye Drayton, Greenville, South Carolina, NBMC member and viewer of WGGS-TV; Cleveland Stevens, Conway, South Carolina, NBMC member and viewer of WGSE(TV); and Nelson Rivers, Columbia, South Carolina, NBMC member and viewer of WCCT-TV.

[5] In its petition, NBMC stated that, due to an unusually large workload, it was impossible to draft and submit the statements in time for the filing of the instant petition.

[6] However, as noted in our decision today concerning NBMC's challenge to the renewal applications of several Florida television stations, we will no longer countenance routine late filings for nonsubstantial reasons by NBMC. *Florida Television Renewals*, FCC 88-78.

[7] In its petition, NBMC stated that Bea Poindexter is a member of NBMC and viewer of WNCT-TV. In its reply, NBMC stated that the affidavit of Ms. Poindexter was forthcoming; however, none was ever filed.

[8] The petitioner did not challenge the licensees' employment practices with respect to women, which we have examined and found adequate.

[9] While the petitioner recognizes that *Bilingual* states that a *substantial* statistical disparity raises questions that may require additional information before license renewal can be granted (*Bilingual, supra*, at 629-30), the petitioner maintains that the instant case nevertheless warrants such an inquiry because the stations' statistical records are barely above the processing guidelines with no indication of reasonable improvement from the previous license term.

[10] In *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), we stated that all EEO programs would henceforth be thoroughly reviewed, regardless of whether a station's profile came within the processing guidelines, and that these guidelines were being used primarily for administrative efficiency.

[11] If factual questions remain after our initial review, we will conduct an inquiry or investigation. If, after this process, the factual questions persist and are substantial and material, we will designate the application for hearing. *Id.*

[12] As noted, WGGS-TV, WGSE(TV) and WCCT-TV are all licensed to Carolina Christian Broadcasting. While NBMC believes all have common faults, *i. e.*, an identical analysis of the effectiveness of each station's EEO program (Form 396, Section X), and no minorities listed in the Officials and Managers category, we have chosen to focus on each station's individual efforts in assessing its EEO compliance. The stations vary in size, are located in different markets, and have their own recruitment needs. However, NBMC's point concerning the boilerplate language in the EEO programs' analysis section (Section X) is well taken. We, therefore, admonish the licensee to focus more attention in the future on each station's individual EEO accomplishments, problems, and proposals. On the other hand, with regard to the lack of Black officials, we note that NBMC has submitted no evidence of discriminatory placement of employees, and the stations' submissions (*see* discussions of each station, *infra*) indicate that adequate EEO programs are in place. Accordingly, we find that further inquiry on this charge is not warranted.

[13] Blacks are the dominant minority in the labor force relevant to each of the petitioned stations (representing at least 83% of the minorities in each market), and their treatment is the focus of the petition to deny. Thus, our principal concern here is with each station's efforts with respect to Blacks. *Bilingual, supra*, at 625; *Pyle Communications of Beaumont*, 2 FCC Rcd 1793 (1987) *appeal filed sub nom. Beaumont Branch of the NAACP and National Black Media Coalition v. Federal Communications Commission*, No. 87-1188 (D.C. Cir. April 27, 1987); *Metroplex Communications of Florida, Inc.*, 96 F.C.C. 2d 1090 (1984). Of course, we also examine a licensee's EEO submission to assure ourselves that appropriate affirmative efforts were made with respect to all minority group members. *Bilingual, supra* at 625 n. 7.

[14] The petitioner contends that the licensee listed Coastal Carolina College as a referral source, but failed to contact the college during the reporting period. In response, the licensee submitted a letter from the college's Director of the Instructional Media Center as corroboration and stated that it maintains contact with the college through a representative not contacted by the petitioner. Based on the evidence, we find that the licensee's contacts with referral sources raise no question warranting further inquiry.

[15] The newly hired Black woman was then promoted to the part-time position of assistant to an executive producer.

[16] The petitioner contends that the licensee misrepresented its association with Allen University. However, in view of a letter from the school's president, it is clear that the licensee contacted the Beulah Youth Development Council, which is affiliated with, and located on the campus of, Allen University. Additionally, the president's letter indicates that the school was contacted by the licensee during the reporting period. Thus, we are satisfied that the licensee did not misrepresent its efforts.

[17] The licensee's submissions reveal that several organizations, such as the NAACP and Columbia Junior College, were contacted late in the license term without reference to any particular job opening. Referral sources should be contacted each time an opening occurs.

[18] Although the licensee's EEO program lists three universities, two of them are characterized as future referral sources in the licensee's pleadings. Thus, it appears that they were not utilized during the license term under review.

[19] The licensee mentions that one minority was inadvertently omitted in its annual report, but fails to mention whether the omitted minority is Black.

[20] The licensee states in its renewal application that a Black female employee filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). Upon review of the charge, the EEOC declined to initiate proceedings against the

licensee. Subsequent to the EEOC's finding, the employee filed suit in federal court. As of this time, the court has not rendered a final decision. Filing a civil suit does not, in and of itself, raise a substantial question of discrimination. Thus, we find that further action is not warranted at this time; however, upon a *final* judicial determination, we will review the matter and take whatever action, if any, is appropriate.

[21] The preliminary statistical analysis results from a comparison of the percentage of *all* minorities on the station's staff with the percentage of *all* minorities in the relevant labor force. *Michael Mathiesen*, 53 R.R. 2d 997, 1002 (1983); *Storz Broadcasting Co.*, 88 F.C.C. 2d 641, 642 (1981). However, where one minority group is predominant, the Commission will analyze a station's employment policies with respect to that particular minority. *See supra* note 13.

[22] In this regard, NBMC submits a letter from Furney K. James, Director of Career Planning and Placement Service at East Carolina University, in which he states, "Your [Mr. David Honig, NBMC counsel] letter of October 16, to Mr. Richard Farris in the ECU Personnel Department has been referred to this office. I cannot remember any specific requests to this office for referrals of applicants between August 1985 and July 1986." Because the Director does not mention WNCT-TV or indicate that his reply is in response to an inquiry concerning verification of referral contacts initiated by WNCT-TV, no substantial and material question is raised about this licensee's recruitmentcontacts.

[23] In *Bilingual*, *supra*, the court indicated that a substantial statistical disparity between the available minority workforce and a station's minority employment, coupled with a languishing affirmative action plan, raises a question as to whether the station's poor EEO performance is due to inadvertence or to intentional discrimination, which has to be resolved before license renewal is appropriate. The court left the manner of resolving the question to our discretion.

[24] We emphasize again that the numbers alone are not a basis for our action. We use them simply as a tool, just as the licensee should have used them as a tool to trigger a reassessment of its efforts. Although these efforts were not so deficient as to warrant more severe sanctions, the licensee should have reevaluated and retooled these efforts. Failure to do so warrants the imposition of reporting conditions.

[25] Upon submission of the first report, the Commission's staff will review the licensee's EEO performance, and if it is determined that the licensee has developed an effective EEO program, the staff will advise the licensee that a second report will not be required. On the other hand, if the licensee's report indicates that additional monitoring is warranted, the second report will be required.

[26] The licensee may contact the EEO Branch of the Mass Media Bureau's Enforcement Division (202-632-7069) for information on the preparation of employment reports. In this regard, we advise the licensee that it need *not* submit the names of the persons referenced in its reports; the identifying information specifically requested will suffice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

CATAWBA VALLEY BROADCASTING COMPANY, INC.

For Renewal of License of Station WHKY-TV
Hickory, North Carolina — File No. BRCT-860728KI

DIVERSIFIED COMMUNICATIONS

For Renewal of License of Station WPDE-TV
Florence, South Carolina — File No. BRCT-860801KF

PAPPAS TELECASTING OF THE CAROLINAS, INC.

For Renewal of License of Station WHNS(TV)
Asheville, North Carolina — File No. BRCT-860801KR

UNIVERSITY OF NORTH CAROLINA

For Renewal of License of Station WUNC-TV *et al.*
Chapel Hill, North Carolina — File Nos. BRET-860804KF, BRET-860804KG, BRET-860804KH, BRET-860804KI, BRET-860804KJ, BRET-860804KK, BRET-860804KL, BRET-860804KM, BRET-860804LN

MEMORANDUM OPINION AND ORDER

Adopted: February 25, 1988; Released: April 4, 1988

BY THE COMMISSION:

1. The Commission has before it for consideration: (i) an Informal Objection filed November 3, 1986 by the National Black Media Coalition (hereinafter "NBMC" or "Objector)[1] against the captioned license renewal applications;[2] (ii) opposition pleadings from the licensees; (iii) NBMC's reply, and (iv) various related pleadings. [3]

2. Catawba Valley Broadcasting Company, Inc., licensee of Station WHKY-TV, contends that NBMC lacks standing to bring this informal objection because it failed to submit supporting affidavits. Our rules require that an informal objection be in written form, signed and submitted prior to any action by the Commission on the challenged application. 47 C.F.R. § 73.3587. Because NBMC's informal objection meets the listed criteria, we accept it as filed.

3. The University of North Carolina (UNC), licensee of Station WUNC-TV and its affiliates,[4] contends that NBMC's reply to the licensees' oppositions should be dismissed on procedural grounds as an unauthorized pleading. While UNC maintains that the Commission's rules governing informal objections do not provide for reply pleadings, we have considered them in the past. *See Texas Broadcast Renewals*, 99 F.C.C. 2d 377, 378 n. 2 (1984). Accordingly, we accept NBMC's consolidated reply.

4. Initially, NBMC suggests that the Commission increase its processing guidelines to 60% of parity for review of the captioned stations' applications. NBMC maintains that many licensees view the guidelines as a "ceiling" rather than a "floor" for minority employment, pointing out that most of the licensees in the instant case operated just above or just below the 50% parity guidelines throughout the license term. Because the guidelines have been unchanged since 1980, NBMC contends that the Commission should now shrink the "zone of reasonableness" to encourage the broadcast industry to move closer to parity with the local minority labor force.

5. The University of North Carolina (UNC) opposes NBMC's request for an immediate change, contending that such a change should be made by the Commission only in a Rule Making proceeding. The licensee maintains that *ad hoc* application of a new standard to the challenged stations without prior notice would be both inappropriate and unfair. In response, the objector contends that the Commission may adopt the new guideline *sua sponte* because the guideline is not a rule and was not enacted as a result of Rule Making.

6. We agree with NBMC that the guidelines are intended only to assist the Commission in its own processing and, as such, are not subject to rule-making or notice requirements of the Administrative Procedure Act. *See Equal Employment Opportunity Processing Guidelines Modifications for Broadcast Renewal Applicants*, 79 F.C.C. 2d 922 (1980). As we recently noted in *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), the processing guidelines are used as an internal tool in the initial review of applications. When a station's EEO program is reviewed, our principal focus is on the station's efforts to recruit, train and promote qualified minority and female applicants, and to assure that equal opportunities are afforded to employees and job applicants. Thus, our final determination as to compliance with our rules is based on all the relevant factors, and not on the guidelines. We agree with NBMC that licensees should not view the guidelines as a ceiling for the employment of minorities and females. We take this opportunity to reemphasize and reiterate that a licensee may not cease its efforts to recruit qualified minority and female candidates, even if it has surpassed the 50% of parity guideline, without risking sanction by the Commission.[5] Similarly, the guidelines are not quotas or numerical goals which, if not attained, warrant Commission sanction; again, the focus is on whether the efforts were reasonable under all the circumstances. *Broadcast EEO*, 2 FCC Rcd at 3974. Because the guidelines are thus only an administrative processing tool for the Commission's use, we decline to change the guidelines herein as requested by NBMC. Indeed, we note that in our EEO policy decision,[6] we stated that all licensees' records would be thoroughly reviewed regardless of

whether a station's profile came within the processing guidelines, and that these guidelines were being used primarily for administrative efficiency.

7. NBMC charges that the poor record of minority employment and the "weak, although not absolutely neutral EEO program" of each challenged station indicates that the stations need closer scrutiny to ensure compliance with the Commission's EEO rule (47 C.F.R. §73.2080) and policies.[7] NBMC contends that the challenged stations failed to refer all job openings to their recruitment sources, contacting some sources for "only certain (particularly low-status) jobs or for none at all." NBMC maintains that many licensees believe that simply writing a referral source once or twice a year without identifying particular jobs for which applicants are sought is sufficient to meet the Commission's EEO rule. According to NBMC, few sources will refer applicants "blind" for unspecified positions. Accordingly, it requests that the licensees be encouraged to contact every referral source for every job opening. Finally, NBMC contends that the licensees failed to acknowledge or propose corrections of "deficiencies" from the previous license term. Thus, NBMC urges that reporting conditions should be imposed on the grants to Stations WHKY-TV,[8] WPDE-TV and WHNS(TV). With respect to WUNC-TV *et al*, NBMC requests a short-term renewal with EEO reporting conditions coupled with goals and timetables as an appropriate sanction.

8. The licensees maintain that NBMC failed to raise any substantial and material questions of fact indicating discrimination or noncompliance with the Commission's policies. The licensees, therefore, request renewal of the licenses without conditions.

9. Section 73.2080 of the Commission's Rules requires that broadcast licensees refrain from employment discrimination as well as establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. The Commission evaluates a licensee's efforts to implement its affirmative action program by reviewing all relevant and material information available, including the composition of the station's workforce, the composition of the local labor force, the description of the station's EEO program and policies including recruitment and promotion data, and any EEO complaints filed against the station or licensee. In reviewing the station's employment profile, the Commission compares the station's workforce with the area's available labor force. Although all EEO programs are reviewed, a closer look is generally given to those stations not meeting the Commission's internal processing guidelines.[9] The numbers and percentages are simply analytical aids, however, and are not determinative. As emphasized above, in the absence of evidence of discrimination, our primary concern is the broadcaster's efforts. When the evidence indicates as a whole that the licensee is complying with our EEO rule and policies, the pending application is granted, if otherwise appropriate. When the evidence indicates noncompliance by the licensee, the Commission may impose prospective sanctions such as the submission of periodic progress reports and/or renewal for less than a full term.[10] For less serious cases, the Commission may in its discretion simply issue warnings.

10. Applying the foregoing principles, we have evaluated the stations' EEO efforts in light of their submissions and the arguments made by NBMC. We find that three of the licensees have complied with our EEO rules and policies during the license term and that no further inquiry or sanction is warranted with respect to them.

(a) WHKY-TV, Hickory, North Carolina

Review of the WHKY-TV EEO program indicates that the station contacted several sources for referrals, including the state employment commission (15 referrals), Lenoir-Rhyne College (3 referrals), and the Catawba County school system (6 referrals). Additionally, station employees referred four job applicants. As result of the station's recruitment efforts, six employees were hired during the reporting year, *i. e.*, the twelve month period prior to the license renewal date, of whom two (33%) were Black. Through on-the-job training, a Black female, hired as the traffic manager, assumed additional duties prior to leaving for a managerial position at a local radio station. In addition to the on-the-job training, the station provided internships to students at East Carolina University and the Catawba County school system. Based on its practices during the reporting year, the licensee believes that its EEO program is effective. Blacks comprise 6.8% of the Hickory MSA labor force.[11] While the WHKY-TV renewal application lists no Blacks among the full-time staff of ten employees, the 1986 annual report reflects one (12.5%) Black among the eight full-time employees. Further, although license term annual employment reports prior to 1986 show no Black employees on the full-time staff, the station did employ Blacks on its part-time staff; namely, a Black operative in 1983 and 1984 and a Black technician in 1982. Thus, considering all of the pertinent factors, including the relatively small station staff and composition of the labor force, and the fact that there is no evidence that the station's affirmative action efforts were not sufficient, we find that the licensee's efforts warrant no further inquiry or sanction.

(b) WPDE-TV, Florence, South Carolina

The station's EEO program lists several referral sources contacted during the reporting period, including the NAACP (no referrals), the Pee Dee Community Action Agency (formerly CETA)(10 referrals), several employment services (5 referrals), the state employment commission (20 referrals), area colleges (17 referrals), and area newspapers (the number of referrals was not noted). The station also conducted internship programs with Coker College, Francis Marion College and the University of South Carolina, and participated in the Pee Dee Community Action Agency Job Training Program, which introduced high school students to various aspects of the television business for at least eight weeks per year. As a result of these internship and training programs, the station hired six people, of whom four were minorities. Overall, the station hired 29 employees, including four minorities, during the reporting period. The EEO program also indicates that the station provided on-the-job training for employees, which led to the promotions of three Blacks.[12] The Florence MSA labor force includes 30% Black and 0.8% other minorities. The stations's full-time staff of 47 people included six (12.8%) Black employees, all of whom (13.3%) were listed among the 45 people holding positions in the upper-four job categories.[13]

NBMC argues that the licensee's efforts are inadequate to move the station toward parity with the local labor force availability of minorities. NBMC contends that minority employment has dropped throughout the license

term to 29% of parity in the upper-four job categories, yet the station's EEO program failed to recognize the "deficiency." Lastly, because of a reported decline in Black employment at the station between 1985 and 1986, NBMC urges that a Commission inquiry is necessary to determine whether the departure of Blacks from the station in 1985 occurred before or after the present licensee assumed control.[14]

The licensee contends that there is no basis for concluding that its EEO program is deficient because it includes on-the-job training, hiring and promotion opportunities, and the use of referral sources which are contacted for specific job openings. With respect to minority attrition since the filing of the 1985 Annual Employment Report, the licensee states that most of it occurred prior to its acquisition of the station. The subsequent departures of minority employees, according to the licensee, were voluntary.[15]

Considering the foregoing, we find that most of the decline in minority employment at the station occurred prior to August 1985, which cannot be attributed to any action of the present licensee. Moreover, we find that no question of discrimination exists regarding the departure of Blacks during the licensee's tenure. Finally, we find that the licensee's efforts during its short tenure (11 months between the time it acquired the station and filed its renewal application) to attract, hire, and promote qualified minorities, as identified in the EEO program's list of recruitment contacts, internships and training programs, are consistent with the requirements of our EEO rule. Therefore, neither an inquiry nor the imposition of further sanction is warranted. *Cf. Baltimore Metropolitan Broadcast Stations*, 89 F.C.C. 2d 1183, 1187 (1982).

(c) WHNS(TV), Asheville, North Carolina

Review of the WHNS(TV) EEO program reveals that the station received 451 referrals from sources such as the American Association of Business & Professional Women (10 referrals), the national and local chapter of the National Organization for Women (2 referrals), Asheville-Buncombe Commission on the Status of Women (20 referrals), Asheville Federation of Negro Women (4 referrals), Black Women's Entrepreneurial Council (2 referrals), the Employment Security Commission Job Service offices for Asheville, North Carolina, and Greenville and Spartanburg, South Carolina (34 referrals), as well as three local colleges (50 referrals), local newspapers (culminating in 290 referrals) and *Broadcasting* magazine (39 referrals). As a result of its recruitment efforts, the station hired ten employees during the reporting period, of whom one was Black. The station also conducted an internship program with the University of South Carolina. In addition, the licensee provided tuition reimbursement for eligible employees. The on-the-job training provided by the station resulted in promotions for five employees, which included one Black, who was promoted from Shipping/Receiving Clerk to Master Control Operator. The Asheville labor force includes 7.9% minorities (7.2% Black). Review of the employment profile indicates that the 54 full-time staff members included six (11.1%) minorities, five of whom (9.3%) were Black, and 41 upper-level employees, including two (4.9%) minorities, one of whom (2.4%) was Black. The annual reports indicate that the station has grown from a full-time staff of five in 1984 to a full-time staff of 54 when the renewal application was filed. Minority employment increased from three full-time minority employees in 1985 to six full-time minority employees (five Blacks) at renewal time.

NBMC contends that the station's EEO program warrants reporting conditions. Although the licensee received over 400 referrals during the reporting period, NBMC maintains that the majority of the referrals came from traditional and general sources. NBMC maintains that the three minority sources utilized during the reporting period yielded only six referrals, but no minority media or Black colleges were used or proposed by the licensee for recruitment. Regarding the station's employment profile during the license term, NBMC contends that WHNS(TV) "has never reported more than one minority employee in the top four job categories." Because it is "unsure whether the station's EEO program, given its substandard past track record, is sufficient to generate confidence that minority employment at the station will increase during the coming license term," NBMC urges that conditions be imposed.

Reviewing its EEO program, the licensee contends that it "has been successful in the recruitment, selection, promotion, compensation, and training of minority and female employees," and that its efforts were not properly considered by NBMC. The licensee notes that the station's minority employment in the upper-level positions during the reporting year is above the Commission's guidelines. The licensee also maintains that, during the reporting period, the station hired minorities in greater proportion than those available in the local labor market. The licensee concludes that the station's efforts warrant renewal of its license without conditions.

Although NBMC questions the effectiveness of the licensee's referral sources, the licensee's contacts with its referral sources did result in the hiring of a Black employee. Moreover, NBMC failed to identify any local minority media, colleges or other organizations which the licensee could have used but did not use. *Louisiana / Mississippi Broadcast Stations*, 94 F.C.C. 2d 275, 280 (1983). Further, we have no reason to believe interested Blacks would not apply for jobs based on advertisements in the local newspaper. Nonetheless, we wish to stress to the licensee that employment within the guidelines is not a "safe harbor." The guidelines do not establish upper limits for employment of minorities and women. Thus, broadcasters are expected to continue their affirmative efforts and to refrain from discrimination even after meeting the guidelines. As evidenced from the Commission's decisions adopted today, we will not hesitate to impose remedial measures when a licensee's efforts are inadequate, even where the numbers are not particularly deficient. However, considering all relevant factors, we find the licensee's efforts warrant no further inquiry or sanction.

11. While the following licensee has submitted an extensive paper program in support of its contention that its efforts have been sufficient, we believe that the licensee has not adequately reviewed its employment processes and is unable to take corrective action as necessary. Accordingly, we will impose reporting conditions.

WUNC-TV, Chapel Hill, North Carolina[16]

Review of the EEO program filed by the University of North Carolina Center for Public Television (Center) indicates that the Center contacted numerous referral sources, including predominately Black colleges and most of the four year colleges and technical schools in North

Carolina, the state employment commission, and media sources on the national level (*Afro* newspaper, *Black Enterprise* magazine, *Broadcast Engineering*), regional level (*Journal Constitution*, Atlanta, Georgia; *State*, Columbia, South Carolina; *News - Sentinel*, Knoxville, Tennesee; *Times*, Orlando, Florida; *Times - Dispatch*, Richmond, Virginia), and local level, including specialized minority media (*The Carolina Times*, Durham, North Carolina; *The Charlotte Post*, Charlotte, North Carolina). With respect to training programs during the reporting period, the licensee states that a minority female received training, under its auspices, at the Sony CMX Editing School in California and was subsequently promoted. Overall, seven employees, including the one minority female previously mentioned, were promoted during the reporting period. The Center also conducted a student intern program with the University of North Carolina-Chapel Hill (UNC-CH), North Carolina State University, Western Carolina University, and two predominately Black schools (North Carolina Central University and Shaw University) as well as coordinated a college work-study program with UNC-CH. Additionally, the licensee states that

> "[r]egular student employees are hired from communications programs from several colleges and universities. A high percentage of these students are women and minorities." During the reporting period, the Center hired 30 employees, of whom four (13.3%) were minorities. Based on its analysis of its recruitment techniques, job applications and new hires, the licensee states that a sufficient number of minorities are applying for available positions.

Comparing the Center's staff with the state labor force[17] (21.6% Black, 0.7% Hispanic, 0.5% Asian/Pacific Islander, and 0.9% American Indian), we note that the Center employed 133 full-time employees, of whom 16 (12%) were Black, and 113 employees in the upper-three categories,[18] of whom nine (7.9%) were Black. The Center's staff has grown from 112 employees in 1982 to 133 employees when the license renewal was filed. Except for 1982, the employment of minorities in the upper-level positions during the license term was below our processing guidelines. Overall full-time minority employment, however, met the guidelines throughout the term with the exception of 1986.

NBMC argues that the present statistical record and EEO program of the Center differ little from those of the 1975-1978 license term, which led to the imposition of reporting conditions. *See UNC Renewals*, *supra* note 17. NBMC also contends that the Center operated "well below 50% of parity for minorities" in the upper-level positions, but gave no reason for not meeting the guidelines. NBMC concludes that, because the affirmative action efforts as well as the results achieved have not materially improved, a short term renewal is warranted along with EEO reporting conditions, goals and timetables, coupled with a warning that future noncompliance will lead to an evidentiary hearing.

The licensee argues that its 1981-1986 record is in no way comparable to the circumstances underlying the conditional renewal in 1980. The licensee maintains that it has consistently operated "near or above" the processing guidelines with respect to the upper-level positions, although it also states that "[c]urrently UNC's employment of minorities in the top four [sic] categories is slightly below the benchmark percentage; when current vacancies in positions are filled, we anticipate confidently that once again UNC will satisfy that standard." The licensee also explains that "the State of North Carolina has imposed several vacant position freezes and position reductions during the previous license period . . . .[S]everal positions have not been subject to filling, thus eliminating the prospect for minorities and women." Finally, with respect to its analysis of the effectiveness of its recruitment sources, the licensee states that the "State of North Carolina Position Application Forms do not require indication of referral sources, thus [the] information is not available." The licensee concludes that, nevertheless, it regularly reviews, modifies and monitors its EEO program to ensure its effectiveness, and it contends that a short-term renewal with reporting conditions is unwarranted.

When the Commission imposed conditions on the licensee in 1980, it did so because additional monitoring was appropriate at that time. Subsequently, the licensee received unconditional renewals for the 1981-1986 license term. The renewals were granted because the Commission found that the licensee's performance, including EEO, was in compliance with the Commission's rules and policies. With respect to EEO in particular, the Commission found that the licensee's employment profile and EEO program were adequate.

While the licensee's EEO program is not noticeably different from the one which the Commission found adequate in 1981,[19] there is a distinguishing circumstance between 1981 and 1986. In our view, WUNC-TV did not adequately analyze its 1981-1986 situation with respect to minorities in the upper-three job categories and is in no position to modify its employment practices where appropriate for either overall or upper-level employment. Analyzing the factors that affected its program's effectiveness, WUNC-TV attributes reduced prospects for minorities and women to position freezes and reductions. However, during the license term, the Center's upper-level staff grew from 100 employees in 1982 to 113 when the renewal application was filed. Thus, even if the cited freezes and reductions occurred, there still were many opportunities to recruit and/or promote qualified minorities for upper-level jobs. Moreover, while the percentage of minorities employed overall remained relatively constant, the percentage of minorities employed in upper-level jobs dropped from 13% to 8.8%. WUNC-TV offers no explanation or analysis regarding this decline; it merely suggests that when current upper-level positions are filled, the percentage of minority employees will increase to 50% of parity. Not only is the basis for this belief not apparent, but WUNC-TV does not indicate what, if anything, in its employment process it plans to modify in order to ensure that minorities are recruited and considered for vacancies.[20] Finally, even if the percentage of minorities in the upper-level categories were to increase, we are troubled by the suggestion in the licensee's comments that mere attainment of our processing guidelines is the licensee's goal. The processing guidelines are not quotas nor do they establish upper limits for minority and female employment. As noted above, we expect every licensee to continue active recruitment and promotion efforts even where our processing guidelines have been met. Accordingly, to ensure that appropriate efforts are undertaken by the licensee, we conclude that reporting conditions are necessary.

12. Accordingly, IT IS ORDERED, That the informal objection filed by the National Black Media Coalition IS DENIED.

13. IT IS FURTHER ORDERED, That the license renewal applications for WHKY-TV, WPDE-TV and WHNS(TV) ARE GRANTED.

14. IT IS FURTHER ORDERED, That the license renewal application of Station WUNC-TV *et al* IS GRANTED, subject to reporting conditions. The licensee of the University of North Carolina Center for Public Television is directed to file reports on May 1, 1989 and November 1, 1990, setting forth the following information for each vacancy filled:

(a) For the May 1, 1989 report, a list of all persons hired as well as persons who applied for each position filled during the period April 1, 1988 and March 31, 1989, and for the November 1, 1990 report, a similar list covering the period April 1, 1989 through September 30, 1990,[21] indicating the job title, the station at which the vacancy occurs, the minimum requirements for the position, the qualifications of the job candidates, the referral or recruitment source of each applicant, part-time or full-time status, FCC Form 395 classification, date of hire, sex and race or national origin;

(b) a list of employees as of the most recent payroll period prior to the report's submission date by job title, indicating part-time or full-time status, (ranked from highest to lowest paid), the station at which each employee works, FCC Form 395 classification, date of hire, sex and race or national origin; and

(c) a narrative statement detailing the efforts to recruit for each position filled during the specified periods, including identification of sources used for the purpose of increasing the station's pool of Black applicants and an analysis of their effectiveness.[22]

15. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail – Return Receipt Requested one copy of this Memorandum Opinion and Order to the National Black Media Coalition and to each of the captioned licensees.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] The National Black Media Coalition (NBMC), headquartered in Washington, D.C., is a national association of Black organizations and persons seeking additional Black employment, program service and ownership in the media.

[2] NBMC also informally objected to the license renewal applications of WCTI(TV), New Bern, North Carolina; WITN-TV, Washington, North Carolina; WNRW(TV), Winston-Salem, North Carolina; WCSC-TV, Charleston, South Carolina; WIS-TV, Columbia, South Carolina; and WSPA-TV, Spartanburg, South Carolina. Upon review of the oppositions filed on behalf of WITN-TV, WCSC-TV and WIS-TV, NBMC withdrew its informal objection as to these stations. The informal objections against WNRW(TV) and WSPA-TV were denied by the Chief, Mass Media Bureau, pursuant to delegated authority.

[3] The related pleadings include: i) a letter filed by the University of North Carolina contesting NBMC's reply pleading; and ii) a supplemental opposition filed by Diversified Communications.

[4] The University of North Carolina (UNC) is licensee of nine public television stations in North Carolina: WUNC-TV, Chapel Hill; WUND-TV, Columbia; WUNE-TV, Linville; WUNF-TV, Asheville; WUNG-TV, Concord; WUNJ-TV, Wilmington; WUNK-TV, Greenville; WUNL-TV, Winston-Salem; and WUNM-TV, Jacksonville. The licensee files a consolidated report for these nine stations which comprise the University of North Carolina Center for Public Television.

[5] In *Broadcast EEO*, we stated that all EEO programs would henceforth be thoroughly reviewed, regardless of whether a station's profile came within the processing guidelines, and that these guidelines were being used primarily for administrative efficiency.

[6] *Broadcast EEO*, *supra*.

[7] NBMC did not challenge the licensees' employment practices with respect to women, which we have examined and found adequate.

[8] In its reply to the licensee's oppositions, NBMC asks that the sanction for WHKY-TV include goals and timetables.

[9] *Broadcast EEO*, *supra*.

[10] If factual questions remain after our initial review, we will conduct an inquiry or investigation. If, after this process, the factual questions persist and are substantial and material, we will designate the application for hearing. *See Broadcast EEO*, *supra*.

[11] Blacks are the dominant minority in the labor force relevant to each of the challenged stations (representing at least 88% of the minorities in each market), and their treatment is the focus of the informal objection. Thus, our principal concern here is with each station's efforts with reference to Blacks. *Bilingual - Bicultural Coalition on the Mass Media Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) ; *Pyle Communications of Beaumont*, 2 FCC Rcd 1793 (1987), *appeal filed sub nom. Beaumont Branch of the NAACP and National Black Media Coalition v. Federal Communications Commission*, No. 87-1188 (D.C. Cir., April 27, 1987); *Metroplex Communications of Florida, Inc.*, 96 F.C.C. 2d 1090 (1984). Of course, we also examine a licensee's EEO submission to ensure that appropriate affirmative efforts were made with respect to all minority group members. *Bilingual*, *supra* at 625 n. 7.

[12] The station promoted one Black female cameraperson to a sales position, another Black female cameraperson to traffic log coordinator, and a Black female reporter to co-anchor of two evening news programs.

[13] As originally submitted, the licensee's renewal application profile reflected a full-time upper-level staff of 38, of whom 4 (or 10.5%) were Black. The licensee corrected its renewal application and 1986 Annual Employment Report by amendments filed December 15, 1986.

[14] The licensee acquired the station by assignment of license on August 13, 1985. Thus, our focus is on the station's employment practices during the period subsequent to the acquisition.

[15] The licensee submits the affidavit of Mr. George Anderson, Vice President of Diversified Communications (President-Broadcast Division), who states that, between the filing of the 1985 and 1986 Annual Employment Report, 32 employees left the station, including eight minorities. Of the eight minorities, five left prior to August 13, 1985. The three minorities who left

after the present licensee took control of the station voluntarily resigned: one left for a higher paying position, one left for a position in a larger market, and the other resigned due to personal reasons.

[16] In similar situations involving public television stations licensed to a state or state-funded entity, the Commission has focused on the EEO program of the entire operation rather than the program of the station specifically challenged. *E. g., Georgia State Board of Education*, 70 F.C.C. 2d 948 (1979). Thus, although the petitioners' informal objection names only WUNC-TV, we are viewing it as a challenge against all of the University of North Carolina stations. For simplification, however, we will refer to the licensee by the call letters of the headquarters station, WUNC-TV.

[17] In 1980, the Commission determined that comparison of the Center with the labor force for the State of North Carolina was appropriate. *The University of North Carolina at Chapel Hill*, 79 F.C.C. 2d 248 (1980) (*UNC Renewals*).

[18] WUNC-TV is a non-commercial entity and thus employs no sales persons.

[19] In this regard, the situation involving the Center differs from that described in *KDEN Broadcasting Company*, 55 R.R. 2d 1311 (1984), *recon.* denied, FCC 85-214 (released April 30, 1985), aff'd sub nom. National Black Media Coalition and the Urban League of Metropolitan Denver v. FCC, No. 85-1317 (D.C. Cir. May 14, 1986). In KDEN the Commission criticized the licensee both for inadequate recruitment and a failure to evaluate its recruitment sources. The licensee's record reflected no minorities for two of its three Annual Employment Reports, no minority hires in its EEO program, and no contacts with minority referral sources. The Commission determined that this performance, coming after reporting conditions had been imposed on the 1977 renewal (the 1980 renewal having been found adequate and warranting an unconditional renewal) warranted renewal only for a short term as well as reporting conditions. As noted above, WUNC-TV recruited from minority referral sources, employed minorities throughout the license term, and hired minorities during the reporting period. Hence, although WUNC-TV's efforts were inadequate and warrant sanction, they differ markedly from those noted in KDEN. However, should WUNC-TV's progress reports or future EEO programs reflect a pattern of non-compliant behavior, we will not hesitate to increase the level of sanction or hold a hearing, if necessary. *See* Character Qualifications in Broadcast Licensing, 59 R.R. 2d 801 (1986) (subsequent history omitted).

[20] In this regard, we note that the licensee does not know how many referrals it has received from its various recruitment sources for either overall or upper-level positions; information which is essential for self-evaluation. *See* Baltimore Metropolitan Broadcast Stations, *supra*, at 1192. Thus, the licensee is not in a position to evaluate the effectiveness of its various recruitment sources. Consequently, it cannot determine whether any modifications are necessary.

[21] Upon submission of the first report, the Commission's staff will review the licensee's EEO performance, and if it is determined that the licensee has developed an effective EEO program, the staff will advise the licensee that a second report will not be required. On the other hand, if the licensee's report indicates that additional monitoring is warranted, the second report will be required.

[22] The licensee may contact the EEO Branch of the Mass Media Bureau's Enforcement Division (202-632-7069) for information on the preparation of employment reports. We advise the licensee that it need not submit the names of the persons referenced in its reports; the identifying information specifically requested will suffice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NATIONAL CAPITAL CHRISTIAN BROADCASTING, INC. File No. BRCT-860530LJ

For Renewal of License of
Station WTKK(TV)
Manassas, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: February 25, 1988; Released: April 4, 1988

By the Commission:

1. The Commission has before it: (i) the above-captioned license renewal application for Station WTKK(TV), filed at the end of the 1982-1986 license term by National Capital Christian Broadcasting, Inc. (licensee or NCCB); (ii) a petition to deny the application filed September 2, 1986, by the National Black Media Coalition (petitioner or NBMC); (iii) the licensee's opposition;[1] (iv) an untimely filed reply by NBMC; (v) the licensee's motion to strike the reply;[2] and (vi) various related pleadings.[3] NBMC alleges that the licensee did not comply with the Commission's rules or policies concerning equal employment opportunity. Accordingly, NBMC requests that the Commission investigate the station's employment practices and, thereafter, designate the application for hearing.

2. NBMC contends that the licensee's renewal application EEO program understates the minority presence in the station's recruitment area because the program cites labor force figures for Manassas, Virginia, rather than for the Washington, DC-MD-VA MSA. Using Washington D.C. MSA figures, NBMC alleges that three of the five annual employment reports submitted by the station during the license term show a statistical record below the Commission's processing guidelines.

3. In addition, NBMC argues that since the station's employment profiles reveal a high turnover rate, the station has not taken advantage of the numerous hiring opportunities to recruit and hire minorities. NBMC also contends that the station apparently dismissed four black employees reported to be working at the station in 1985 because no black employees are reported in the 1986 employment report.

4. Concerning the licensee's EEO program,[4] NBMC alleges that "it is about as 'neutral' and non-affirmative as any NBMC has reviewed . . . ." It notes that the program does not list a single minority or female organization, college, or minority publication as a recruitment source. NBMC concludes that an inquiry and/or hearing is necessary in view of the low representation of minorities at the station during the license term, the sudden decline in minority representation in 1986 despite a high rate of job turnover, and the lack of an EEO program.[5]

5. In opposition, the licensee (NCCB) argues that the station's EEO performance should not be measured against the Washington, D.C. MSA. NCCB notes that the station is located in Manassas, Virginia, which is approximately 30 miles west of Washington D.C., where the minority population of the MSA is centered. NCCB maintains that, while residents of Manassas and its immediate suburbs commute to Washington, D.C., the reverse is not true. In addition, NCCB points out that public transportation is not available to bring Washington, D.C., residents to Manassas and that traffic patterns would make commuting from D.C. to Manassas difficult. As a result, NCCB asserts that it has been unsuccessful in attracting and/or keeping employees who live in the District of Columbia or its immediate environs. Therefore, NCCB believes that it is inappropriate to compare the station's EEO performance to the Washington, D.C. area labor force figures.

6. With respect to the station's employment profile, the licensee argues that since it is a small station that serves as a training ground, its job turnover rate is high for minority as well as non-minority employees. Furthermore, the licensee states that NBMC's allegation that four black employees may have been dismissed "could not be further from the truth." While acknowledging that the four black employees shown in the 1985 report are no longer employed at the station, the licensee explains that three resigned to accept better positions at larger television stations, while the position of the fourth was eliminated. Furthermore, the licensee disputes NBMC's contention that its EEO program is ineffective.[6] It states that it published job openings in *Broadcasting* magazine, a source that it considers "far more effective than racially or ethnically oriented publications" because "it appeals to those of all races who are interested in employment in the broadcasting industry." Furthermore, the licensee states that in response to a request by the Commission's staff to amend its EEO program, and in order to correct the noted omissions, it submitted an amendment to its EEO program on September 12, 1986. In view of the above, the licensee concludes that the NBMC petition should be denied.

7. In reply, NBMC contends that inasmuch as WTKK(TV) has hired Washington, D.C., residents in the past and Manassas is within easy commuting range of Washington, D.C., the station should be held to the Washington D.C. MSA labor force. Furthermore, NBMC argues that the licensee's explanation concerning the departure of four black employees is inadequate because there is no indication that the departures were not the result of discrimination. In addition, NBMC contends that the licensee's amendment to the renewal application EEO program does little to correct past deficiencies because it does not propose to contact community organizations or colleges whenever jobs are available and, in any event, should not be considered because it constitutes last minute upgrading. Finally, NBMC charges that the licensee's statement that advertising in *Broadcasting magazine is preferable to advertising in racially or ethnically oriented publications is evidence of an anti-minority bias.*

DISCUSSION

8. Section 73.2080 of the Commission's Rules requires that broadcast licensees refrain from employment discrimination as well as establish and maintain an affirmative action program reflecting positive and continuing efforts

to recruit, employ and promote qualified women and minorities. The Commission evaluates a licensee's efforts to implement its affirmative action program by reviewing all relevant and material information, including the composition of the station's workforce, the composition of the local labor force, the description of the station's EEO program and policies, including recruitment and promotion data, and any EEO complaints filed against the station or licensee. In reviewing the station's employment profile, the Commission compares the station's workforce with the area's available labor force. Although all EEO programs are reviewed, a closer look is generally given to those stations which fail to meet the Commission's internal processing guidelines.[7] The numbers and percentages are simply analytical aids, however, and are not determinative. As emphasized above, in the absence of evidence of discrimination, our primary concern is the broadcaster's efforts. Thus, it would be an error for a broadcaster to assume it has reached a "safe harbor" once it meets the guidelines. Every broadcaster is required to make affirmative efforts and to refrain from discrimination. When the evidentiary record indicates that the licensee is complying with our EEO rules and policies, the pending application is granted, if otherwise appropriate. When the evidence indicates noncompliance by the licensee, the Commission may impose prospective sanctions such as the submission of periodic progress reports and/or renewal for less than a full term.[8] For less serious cases, the Commission may, in its discretion, simply issue warnings.

9. With respect to the four black employees that NBMC alleges may have been discriminated against because of unlawful termination, the licensee explains that three of the employees resigned to accept better jobs at other stations and one position was eliminated. NBMC has presented no evidence to rebut these claims or to suggest that the reasons proffered for the resignation of the three employees were a pretext for discrimination. Moreover, NBMC has presented no evidence to suggest that the elimination of the position held by the fourth employee was due to discrimination. Accordingly, the departure of the employees in question does not raise a substantial and material question of fact requiring further inquiry.

10. As to the matter of the appropriate labor force, when a station is located within an MSA, we use that labor force data as our initial frame of reference in analyzing EEO performance unless the station provides a reasoned explanation for use of alternative data.[9] Here, the licensee seeks to only use labor force data from Prince William County, which includes Manassas, Virginia, the location of the station. It cites as its reasons the station's distance from Washington, D.C., commuting difficulties, and the lack of success in attracting or retaining employees from Washington, D.C. Because of the lack of evidence supporting the licensee's assertions, a letter of inquiry was sent.[10] The information submitted by the licensee showed that 61 persons were hired from October 1, 1981 to June 1, 1986. At the time of hiring, 29 persons resided in the State of Virginia, including 14 in Prince William County, seven in Fairfax County, two in Fauquier County, and six in counties in central and southern Virginia. In addition, four persons resided in the State of Maryland, including one in Baltimore, one in Frederick County, one in Prince Georges County and one in Montgomery County, and three resided in Washington, D.C. The remaining 25 resided at various locations throughout the United States, such as Jackson, Wyoming; Klamath Falls, Oregon; Fords, New Jersey; and St. Petersburg, Florida. The information showed that of the 20 persons employed by the station as of September 17, 1987, 19 currently reside in the State of Virginia, including 11 in Prince William County. However, the information also shows that five of the station's current employees commute more than 40 miles to work, including one employee who resides in Prince Georges County, Maryland, a county in the Washington, D.C. MSA with a significant minority population. Moreover, the licensee did not show that it had regularly utilized any referral sources likely to attract applicants from areas of minority concentration in the MSA. In light of this information, we do not believe that the licensee has provided an adequate and reasoned basis for using a labor force other than the conventional MSA. Accordingly, we will continue to use the Washington, D.C. MSA, as our initial frame of reference in analyzing the station's EEO performance. The Washington D.C. MSA includes 46.6% women and 30.3% minorities (24.7% blacks, 2.9% Hispanics, 2.5% Asians, and 0.2% American Indian). We note, however, that were a licensee to document that, despite extensive recruitment involving use of minority referral sources, it was unable to obtain qualified applicants from areas of minority concentration in the MSA, reference to alternative labor force data would be appropriate.

11. According to its 1986 Annual Employment Report the station's staff was composed of 29 employees, nine of whom were women and one (3.4%) who was an Asian/Pacific Islander. Of 26 employees in upper-level positions, six were women and one (3.8%) was an Asian/Pacific Islander. Prior license term reports reveal that overall minority employment fluctuated from one of 14 (7.1%) employees in 1982 to three of 18 (16.6%) in 1983 to four (all blacks) of 30 (13.3%) in 1985. Similarly, in the upper-four job categories, minority representation fluctuated from one of 12 (8.3%) in 1982 to two of 15 (13.3%) in 1983 to three of 25 (12.0%) in 1985. From 1982 to 1985, blacks occupied all but one of the upper-level positions held by minorities. These have included managerial, technical and sales positions.

12. The EEO program and subsequent filings report that the licensee used traditional referral sources, such as private employment agencies and *Broadcasting* magazine. Further, although the licensee believes that *Broadcasting* magazine is a "far more effective recruitment source than racially or ethnically oriented publications," the program does not indicate whether any black or other minority referrals resulted, information that should have been provided and used by the licensee to analyze the effectiveness of its efforts. We do not believe that the licensee's use of *Broadcasting* magazine and other traditional referral sources, by itself, raises questions of intentional discrimination. At the same time, however, in the absence of monitoring by the licensee to ensure that these sources are, in fact, providing sufficient minority referrals, which apparently did not occur here, the licensee's affirmative action efforts do not meet our requirements. Although two of the 18 hires during the 12 months prior to the submission of the renewal application were minorities, it appears that the licensee made few, if any, efforts to apprise sources of black and other minority applicant referrals of job openings or to analyze the effectiveness (or lack thereof) of those efforts.

13. The evidence before us does not raise a substantial and material question of fact that the licensee has engaged in intentional discrimination. Although there was some variance in minority employment at the station over the license term, we do not believe there was a substantial statistical disparity between the licensee's employment figures and the labor market figures (as reflected in our processing guidelines).[11] In this regard, we note that the licensee's submissions demonstrate that several blacks or other minorities were employed throughout the majority of the license term, including some in the top-four job categories. In 1985, for example, the licensee employed four blacks, three of whom were in the top-four job categories. The fact that a dip in these figures occurred in 1986 does not in and of itself constitute sufficient statistical disparity justifying further inquiry.[12] Moreover, from 1983 to 1985, the station's overall minority employment was close to the processing guidelines; the employment figures for 1986 were adequately explained as being due to the resignation of three of the station's four black employees to accept better jobs at other stations and the elimination of the fourth position. This explanation has not been rebutted. We are, however, concerned that during most of the 1981-1986 license term, the licensee did not establish, maintain, and carry out a positive, continuing program of EEO efforts. Most significantly, it does not appear that during most of the license term the licensee made affirmative efforts to ensure that potential sources of black and other minority applicant referrals were apprised of job openings. Nor does the record show that the licensee evaluated the productiveness of its recruitment sources. In addition, the licensee omitted information from two sections of its EEO program. On this basis, we find that the licensee has not adhered to the affirmative action requirements of our EEO rule.[13] We, therefore, are imposing reporting conditions and admonish the licensee that in the future it should submit all the information requested in the station's renewal application and EEO reports.[14] We note, as we stated in *Pyle Communications of Beaumont, Inc.*,[15] that our finding of licensee noncompliance with the affirmative action portion of the EEO rule does not compel the holding of an evidentiary hearing on the licensee's fitness to remain a licensee. In these circumstances, the Commission enjoys broad discretion in selecting and imposing sanctions.[16]

14. Accordingly, IT IS ORDERED, That the petition to deny filed by the National Black Media Coalition IS DENIED.

15. IT IS FURTHER ORDERED, That the license renewal application for Station WTKK(TV) IS GRANTED, subject to the EEO conditions specified herein.

16. IT IS FURTHER ORDERED, That the licensee of WTKK(TV) file an original and one copy of the following on May 1, 1989 and November 1, 1990:[17]

(a) For the May 1, 1989 report, a list of all job vacancies during the twelve months preceding April 1, 1989, and for the November 1, 1990 report, a list covering the period April 1, 1989 to October 1, 1990, indicating the job title and full or part-time status of the position, the race or national origin, sex and referral source of each applicant for each job and the race or national origin and sex of the person hired, FCC Form 395 classification of the position, the minimum job qualifications for each vacancy, and the qualifications of the job candidates;

(b) a list of employees as of April 1, 1989 and October 1, 1990 by job title indicating part-time or full-time status (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin; and

(c) details concerning the station's efforts to recruit for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

17. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - Return Receipt Requested one copy of this Memorandum Opinion and Order to each of the parties to this proceeding.[18]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] The licensee of WTKK(TV) initially challenges the petition, contending that it fails to meet the requirement of the Communications Act that allegations should be supported by the affidavit of a person with personal knowledge of the facts alleged. However, the petition provides factual allegations to support its contention that the grant of the license would not serve the public interest; is supported by the affidavit of Mr. Pluria Marshall, a resident of Washington, D.C., who maintains that he is a regular viewer of Station WTKK(TV); and is based, for the most part, on documents which we officially notice, i.e., the station's EEO program and annual employment reports. Given the above, we are satisfied that NBMC has met the procedural requirements of a petition to deny. *NAB Petition for Rule Making*, 82 FCC 2d 89, 99 (1980).

[2] With respect to the licensee's motion, it is argued that because the reply was filed two days late, on October 24, it should be dismissed without consideration. While we are concerned that the Commission's processes not be abused, there is no showing that the untimely filed pleading is captious or purely obstructive. *KQED, Inc.*, 88 FCC 2d 1159, 1167 (1982). Moreover, the licensee does not question the good faith of the petitioner. Thus, given the above and the fact that the reply will not prejudice any party, we believe it is more consistent with the public interest to consider the information now. *See Storer Broadcasting Co.*, 56 RR 2d 243 (1984).

[3] Also before us are: (i) a letter of inquiry to the licensee dated September 17, 1987; (ii) the licensee's response; and (iii) the petitioner's comments.

[4] NBMC maintains that the licensee violated Section 73.3526(a)(1) of the Commission's Rules by not having the station's 1981 and 1986 EEO programs in its public file. In opposition, the licensee asserts that the 1981 EEO program was in the file as a part of the station's renewal application and that NBMC copied it. In rebuttal, NBMC denies that it copied the 1981 EEO program when it visited the station's studio. We note, however, that NBMC's allegation is unsupported by a person having personal knowledge of the facts alleged. Accordingly, we find that no substantial and material question of a violation of the Commis-

sion's public file rule is raised because it is by no means clear that the documents were not in the file and because of the absence of an affidavit filed by NBMC.

[5] NBMC did not challenge the licensee's employment practices with respect to women, which we have examined and found acceptable.

[6] Although NBMC did not raise this issue in its petition, the licensee explains that Section III, Policy Dissemination, and part of Section VIII, Job Hires, of its 1986 EEO program were inadvertently left blank in the typing process. In reply, NBMC asserts that the licensee's account of why sections of the EEO program were omitted raises a question of candor. According to NBMC, it is inconceivable that an experienced broadcaster would sign such a document unless the omissions were deliberate. However, the licensee initiated measures to correct the omissions prior to the receipt of the petition to deny and fully explained the reasons for the omissions. Thus, there is no evidence to suggest that the omissions resulted from misrepresentation or lack of candor. *See Metrogeneral Communications of Nashville, Inc.*, 99 FCC 2d 256, 261-62 (1984).

[7] In *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), we stated that all EEO programs would henceforth be thoroughly reviewed, regardless of whether a station's profile came within the processing guidelines, and that these guidelines were being used primarily for administrative efficiency.

[8] If factual questions remain after our initial review, we will conduct an inquiry or investigation. If, after this process, the factual questions persist and are substantial and material, we will designate the application for hearing. *Id.*

[9] In *Broadcast EEO*, *supra*, note 7, the Commission indicated that while it expected MSA or county data to continue to be relevant to most licensees, it would allow the use of alternative data when a licensee justifies this departure with reference to factors like the distance of the station from areas with significant minority population in the MSA, commuting difficulties and the lack of success of previous recruitment efforts. *Id.* at p. 3973. *See also Cable EEO Report and Order*, 102 FCC 2d 562, 50 Fed. Reg. 40836 (1985).

[10] The licensee was required to submit information concerning the residence of each employee hired from October 1, 1981 to June 1, 1986, at the time each was offered employment with the station, and the residence of each current employee as of September 17, 1987. The licensee was also asked to provide the number of referrals that resulted from contacts with each of the recruitment sources listed in Section IV of the station's EEO program.

[11] In *Bilingual Bicultural* Coalition on the Mass Media, Inc. v. FCC, 595 F.2d 621 (D.C. Cir. 1978), the court indicated that a substantial statistical disparity between the available minority workforce and station's minority employment, coupled with a languishing affirmative action plan, raises a question as to whether the station's poor EEO performance is due to inadvertence or to intentional discrimination, which has to be resolved before license renewal is appropriate. The court left the manner of resolving the question to our discretion.

[12] A statistical disparity between a licensee's employment figures and labor market figures for one year is not the equivalent of "substantial disparity" for purposes of Bilingual.

[13] We note, however, that the licensee amended its EEO program at the close of the license term to reflect a stronger commitment to seeking out minority applicants.

[14] Baltimore Metropolitan Broadcast Stations, 89 FCC 2d 1183, 1184 (1982).

[15] 2 FCC Rcd 1793, 1797 nn. 9 & 10 (1987), appeal filed sub nom., Beaumont Branch of the NAACP and National Black Media Coalition v. Federal Communications Commission, No. 87-1188 (D.C. Cir., April 27, 1987).

[16] *Id.*

[17] Upon submission of the first report, the Commission's staff will review the licensee's EEO performance, and if it is determined that the licensee has developed an effective EEO program, the staff will advise the licensee that a second report will not be required. On the other hand, if the licensee's report indicates that additional monitoring is warranted, the second report will be required.

[18] The licensee may contact the EEO Branch of the Mass Media Bureau's Enforcement Division for information on the preparation of employment reports at (202) 632-7069. In this regard, we advise the licensee that it need not submit the names of the persons referenced in its report; the information rquested will suffice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

ARKANSAS EDUCATIONAL TELEVISION COMMISSION

For Renewal of License of Stations KETS(TV), *et al.* Little Rock, Arkansas — File Nos. BRET-870130KL, BRET-870130KP, BRET-870130KO, BRET-870130KN, BRET-870130KQ

LOUISIANA EDUCATIONAL TELEVISION AUTHORITY

For Renewal of License of Stations WLPB-TV, *et al.* Baton Rouge, Louisiana — File Nos. BRET-870202KV, BRET-870202KY, BRET-870202KX, BRET-870202KZ, BRET-870202KW, BRET-870202LA

GREATER NEW ORLEANS EDUCATIONAL TELEVISION FOUNDATION

For Renewal of License of Station WYES-TV New Orleans, Louisiana — File No. BRET-870202KS

KTBS, INC.

For Renewal of License of Station KTBS-TV Shreveport, Louisiana — File No. BRCT-870202KJ

MEMORANDUM OPINION AND ORDER

Adopted: February 25, 1988; Released: April 4, 1988

BY THE COMMISSION:

1. The Commission has before it for consideration: (i) a "Petition to Deny" filed April 30, 1987, by the National Black Media Coalition and others (hereinafter "petitioners)[1] against the captioned license renewal applications; (ii) opposition pleadings from the licensees; (iii) petitioners' reply, and (iv) various related pleadings.[2]

2. *PROCEDURAL MATTERS.* With respect to standing, the petitioners have submitted affidavits from members of the Louisiana Black Media Coalition and the NAACP who are viewers or residents of the service areas of the challenged stations. [3] However, the affidavits were not timely filed. While we will accept the late-filed affidavits *nunc pro tunc*, *Malrite of New York*, 71 FCC 2d 241, 242 (1979), the explanation for their late submissions, while not suggestive of abuse, reflects a continuing lack of diligence in complying with our procedural rules. We have addressed this issue in our decision today concerning NBMC's challenge to the renewal applicants of several Florida television stations, putting NBMC on notice that routine late filings for nonsubstantial reasons will not be countenanced. *Florida Television Renewals*, FCC 88-78.

3. *PLEADINGS.* The petitioners charge that the EEO programs and employment profiles of each of the stations reveal that the licensees have not complied with the Commission's EEO rule (Section 73.2080) with respect to blacks and other minorities.[4] The petitioners contend that the challenged stations' employment of minorities, particularly blacks, during the license term "was insubstantial or token at best" and that "the respective stations' EEO proposals offer no meaningful assurance that minority recruitment, hiring, training, and promotion will accelerate during the coming license term." The petitioners therefore request that the Commission investigate the EEO policies of Stations KETS(TV), WYES-TV, and KTBS-TV, and designate their applications for an evidentiary hearing. As for Station WLPB-TV, the petitioners request that the Commission immediately designate its application for a evidentiary hearing and deny the application.

4. The licensees deny all the general allegations and maintain that the petitioners have failed to present evidence of noncompliance with the Commission's rules or policies. The licensees, therefore, request an unconditional renewal of license.

5. *DISCUSSION.* Section 73.2080 of the Commission's Rules requires that broadcast licensees refrain from employment discrimination as well as establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. The Commission evaluates a licensee's efforts to implement its affirmative action program by reviewing all relevant and material information, including the composition of the station's workforce, the composition of the local labor force, the description of the station's EEO program and policies, including recruitment and promotion data, and any EEO complaints filed against the station or licensee. In reviewing the station's employment profile, the Commission compares the station's workforce with the area's available labor force. Although all EEO programs are reviewed, a closer look is generally given to those stations not meeting the Commission's internal processing guidelines.[5] The numbers and percentages are simply analytical aids, however, and are not determinative. As emphasized above, in the absence of evidence of discrimination, our primary concern is the broadcaster's efforts. Thus, it would be an error for a broadcaster to assume it has reached a "safe harbor" once it meets the guidelines. Every broadcaster is required to make affirmative efforts and to refrain from discrimination. When the evidentiary record indicates that the licensee is complying with our EEO rules and policies, the pending application is granted, if otherwise appropriate. When the evidence indicates noncompliance by the licensee, the Commission may impose prospective sanctions such as the submission of periodic progress reports and/or renewal for less than a full term.[6] For less serious cases, the Commission may in its discretion simply issue warnings.

6. Applying the foregoing principles, we have evaluated the stations' EEO efforts in light of their submissions, the petitioners' arguments, and the relevant labor force data[7] for women and minorities. We find that the licensee of KTBS-TV has generally complied with our EEO rules and policies. Accordingly, we find that the station's EEO performance warrant no further inquiry or administrative sanction.

(a) KTBS-TV, Shreveport, Louisiana

The station's EEO program indicates that it contacted numerous referral sources, including the Shreveport Junior League (eight referrals), the NAB Employment Clearing House (no referrals), the Shreveport Job Corp (one referral), the Louisiana State Employment Service (one referral), five state educational institutions with significant minority and female enrollments (10 referrals), and *Broadcasting* Magazine (five referrals). With respect to training programs during the reporting period, the program states that three women received on-the-job training while three female students participated in internship programs with the station. The licensee also indicates that its internship program with a state college resulted in the hiring of a black male and a black female, and it states that two of the three women who were promoted during the reporting period were black. However, of the nine hires during the year ending December 31, 1986, none were minorities.[8] The Shreveport MSA labor force includes 30.6% minorities (28.6% black).[9] The KTBS-TV renewal application employment report shows a full-time staff of 83 persons, including 13 (15.6%) minorities (all of whom are black), while its upper-level staff of 74 persons includes 12 (16.2%) blacks. The station's license term employment reports show that the size of the workforce has varied between 81 and 87 employees overall. Of these, the station employed 13 (16.0%) blacks in 1983, 13 (15.3%) blacks in 1985, and 13 (15.9%) blacks in 1987. In the upper-four job categories, which varied between 69 and 76 employees, the station employed 10 (14.5%) blacks in 1982, 12 (16.4%) blacks in 1985 and 12 (16.7%) in 1987.

The petitioners charge that the station's current license term EEO record, when compared to its previous license term EEO record, exhibits a "reduction in the level of affirmative action efforts." They note that, even though the station's 1987 EEO program shows that no blacks were hired as compared to a 50% black hiring rate in 1982, the licensee indicates that a sufficient number of minorities are applying for available positions. Furthermore, the petitioners point out that the only black employee classified as an official and manager is a "Building Maintenance Manager," and they contend that this person is misclassified. In any event, citing *Carolina Radio of Durham, Inc.*, 74 FCC 2d 571 (1979), the petitioners argue that the near absence of minorities in meaningful decision-making positions is cause for concern.

Addressing the petitioners' allegation that its EEO record is deficient, the licensee states that as a consequence of its recruitment efforts during the license term, it received expressions of interest for employment from 22 students, 11 of whom were black; a black female began working at the station as a News Reporter/Consumer Affairs Reporter on May 28, 1987; and a black male began working at the station as a News Reporter on June 11, 1987.[10] In addition, the licensee states that offers of employment were extended to a black male in 1985 and another black male in 1986, but both offers were declined.

The licensee points out that minorities comprised 34.4% (117 out of 340) of the applications it has received and retained and 24% (69 out of 287) of the applications that it received in 1986. Finally, the licensee notes that of the 61 persons who were hired from 1982 to 1986, 10 (or 16.4%) were minorities, all of whom were hired for positions in the upper-four job categories. Thus, the licensee believes that its recruitment techniques, job applicant data and hiring data demonstrate that "a sufficient number of minorities and women are applying for available positions." With respect to the petitioners' allegation that it misclassified a black female employee as an official and manager, the licensee maintains that as the Building Maintenance Manager, the employee supervises another full-time employee, has full authority to hire additional temporary employees and terminate the employment of those under her, and has complete authority to purchase maintenance supplies. Finally, with respect to the petitioners' charge that there is a near absence of blacks in meaningful positions, the licensee notes that throughout the license term the station has only filled two positions in the officials and managers category, one by promotion and one by changing an unpaid, volunteer position to a paid administrative position.

As we noted in *Carolina Radio, supra*, the Commission looks at a station's overall employment, including all upper-four job categories, rather than only one job category in making a determination of adherence to our EEO rule. *See , e. g., Miami Valley Broadcasting Corp.*, 86 FCC 2d 776 (1981). The licensee's record indicates that its recruitment efforts have resulted in an abundance of minority applicants, which in turn has led to blacks and other minorities being offered employment, hired, trained and promoted. Accordingly, we do not believe that a substantial and material question of fact is raised concerning the licensee's EEO compliance.[11] With respect to the allegations that the licensee misclassified a black female as an official and manager, although the licensee indicates that the individual in question supervises one full-time employee and exercises managerial responsibilities, it appears that the duties of the Building Maintenance Manager are primarily those of a skilled manual worker rather than those of a member of management. As such, we believe that the employee in question should be classified as craftsperson rather than an official and manager. Although we do not find the licensee's original classification so unreasonable as to raise a question of intentional misclassification, *see Metrogeneral Communications of Nashville, Inc.*, 99 FCC 2d 256, 261-62 (1984), we admonish the licensee to focus on an employee's job duties, and not job title, when making classification decisions. Considering the foregoing,[12] we find that no administrative action or sanction is warranted.

7. The following stations' EEO submissions indicate that the licensees did not fully comply with the Commission's EEO rule and policies during the 1982-1987 license term. Although the licensees contacted recruitment sources, they often did not track the number of referrals obtained from these sources. Because the licensees did not maintain the referral data, it does not appear that they engaged in meaningful self-assessment. Moreover, even when it appeared that present methods of recruitment were not generating a sufficient member of minority applicants, no meaningful proposals were made to change the situation.

(a) KETS(TV) Little Rock, Arkansas

By way of background, KETS(TV) is one of five noncommercial educational television stations licensed to the Arkansas Educational Television Commission (AETC). The stations include KETS, Little Rock; KEMV, Mountain View; KETG, Arkadelphia; KAFT, Fayetteville; and KTEJ, Jonesboro. As reflected in the licensee's employment reports,[13] almost 75% of the licensee's employees work at the headquarters office in Conway, which is between 25 and 30 miles north of Little Rock. The headquarters is the programmming and operational arm of AETC and the five stations serve primarily as satellites, each having fewer than five full-time employees. However, the licensee submits one EEO program for AETC. Although the petition is filed against Station KETS, the petitioners challenge AETC's licensee's employment practices. Because all of the AETC station renewal applications are now before us, we will focus our attention on AETC's overall EEO compliance.

Review of the EEO program filed by AETC indicates that the licensee contacted numerous sources for referrals, including the Urban League, the NAACP, the Arkansas Human Development Corporation, the Arkansas Department of Education (six referrals), the state employment office (12 referrals), two area colleges with significant minority enrollments, statewide newspapers which produced 132 referrals (Arkansas *Gazette*, and Arkansas *Democrat)*, regional newspapers (Fayetteville, Fort Smith, Jonesboro, El Dorado), and national publications (*Broadcasting* and *Current* magazine). With respect to training programs, the EEO program reveals that AETC did not conduct specific in-house training. However, the licensee states that a female of Pacific Island origin received college-level training in D Base III Programming and attended seminars in personnel management and project cost training; a black male Producer received training under its auspicies in use of the network's Sony editing equipment; and two black male Videographer/Editors attended a workshop in Dallas on camera operation techniques. During the 12 month reporting period ending December 31, 1986, AETC hired 18 persons; however, none were minorities.

Based on an analysis of its recruitment techniques, job applications and new hires, the licensee believes that a sufficient number of minorities are not applying for available positions. The licensee indicates that it will continue to utilize many of the same recruitment sources in an effort to attract additional minority and female candidates, and it states that it will "continue to work toward attracting additional . . . [minorities] by utilizing . . . [Arkansas'] statewide networks for posting . . . ." However, the licensee does not explain how this differs from its use of the state Department of Education, which is said to forward every KETS opening to some 125 entities. Comparing the AETC profile with the state labor force[14] (13.2% black, 0.6% Hispanic, 0.6% American Indian, and 0.3% Asian/Pacific Islander), we note that AETC employs 75 full-time employees, of whom 10 (13.3%) are minorities (6 or 8.1% are black), and 66 employees in the upper-three[15] categories of whom 8 (12.1%) are minorities (5 or 7.6% are black).[16] Previous license term reports show that the AETC staff has increased in size from 67 employees in 1983 to 74 employees in 1987 and that minority representation has consistently exceeded the Commission's guidelines, both overall and in upper-level positions throughout the license term.[17]

Viewing this record, the petitioners argue that AETC did not employ minorities in "significant positions" throughout the license term. The petitioners also contend that AETC's failure to document the number of referrals it received from most of its job referral sources makes it impossible to determine whether minority organizations routinely received notices of job vacancies. Finally, although the petitioners fault AETC for not utilizing minority newspapers, they do not refer to any specific minority media sources which the licensee could have used but did not use. *Louisiana / Mississippi Broadcast Stations*, 94 FCC 2d 275, 280 (1983).

In opposition, AETC points out that its Chief Executive during a substantial portion of the license term was a minority; that eight other minorities hold jobs in upper-level positions; and that the eight-member Arkansas Educational Television Commission, itself, includes one black. With respect to recruitment, AETC explains that it sends a notice of all job openings to the Arkansas State Department of Education, which then forwards the vacancy notices to over 125 agencies, schools and private organizations. However, it acknowledges that it is often unable to track the source of each referral. Finally, AETC explains that of the 18 vacancies it reported filling during 1986, only four were for full-time positions, while 14 were for temporary positions associated with short-term projects. In reply, the petitioners argue that a *Bilingual* investigation[18] is necessary to resolve questions concerning AETC's recruitment and hiring practices.

Review of the licensee's EEO record indicates that AETC made efforts to recruit and employ blacks and other minorities. Considering these factors and the absence of any evidence suggesting discrimination,[19] we do not believe a *Bilingual* inquiry is warranted. However, because the licensee did not track the source of many of its referrals, it does not appear that AETC engaged in on-going self-assessment. While the licensee contacted referral sources and obtained nearly 150 referrals, steps were not taken to determine whether these sources were able to refer qualified minority applicants. We wish to emphasize that where, as here, a licensee has not been successful in recruiting minority and female applicants, it should reassess and try new and varied sources. Here, the licensee's proposal to work toward attracting minority applicants by continuing to utilize referral sources which in the past have not been productive suggests that the licensee did not engage in meaningful self-assessment. We also wish to point out that while the licensee exceeded our processing guidelines throughout the license term, that fact does not demonstrate that adequate EEO efforts were made. The processing guidelines are simply a tool; they are not quotas nor do they establish upper limits for the employment of minorities and women. Accordingly, in order to monitor the licensee's efforts, including its self-assessment, we will impose reporting conditions on AETC. Further, we admonish AETC to submit in the future all the information requested in its renewal application and EEO reports. *See Baltimore Metropolitan Broadcast Stations*, *supra* note 14, at 1192.

(b) WLPB-TV, Baton Rouge, Louisiana

By way of background, WLPB-TV is one of six noncommercial educational television stations licensed to the Louisiana Educational Television Authority (LETA). The other stations, which are also before us for renewal, include KLTM, Monroe; KLTS, Shreveport; KLPB,

Lafayette; KLTL, Lake Charles; and KLPA, Alexandria. The licensee's annual employment reports[20] and renewal application show that most of the licensee's employees work at its headquarters, which is colocated with WLPB, the licensee's programming and operational arm. Each of the other stations employs fewer than five full-time persons, and each operates as a "satellite" facility, simultaneously broadcasting an identical program schedule originated at the Baton Rouge studio. The licensee uses one EEO program which is applicable to all its stations.

Review of the EEO program filed by LETA shows that although the licensee contacted the NAACP and three women's organizations, no referrals are listed. LETA states that "due to budget constraints, there has been no recruiting and/or advertising other than through the State Department of Civil Service (136 referrals)." LETA explains that the Department of Civil Service contacts almost 700 entities, including minority recruitment sources, vocational and technical schools and state colleges with significant minority enrollments, and minority owned newspapers. While the licensee acknowledges that it has encountered difficulties in determining the number of referrals it obtains through the Louisiana Department of Civil Service, it indicates that it is changing its recordkeeping system in order to keep track of its referrals. The EEO program indicates that LETA provides on-the-job training to upgrade the skills of employees and it employs students from the local universities who are interested in gaining broadcast experience; however, it is unclear whether minorities benefitted from these training programs. Of the six hires during the year ending January 26, 1987, three (50.0%) were minorities.[21] Minorities comprise 26.8% of the state labor force (nearly all black).[22] The LETA renewal application profile shows a full-time staff of 80 persons including 10 (12.5%) minorities (nine blacks), and an upper-level staff of 70 persons, including seven (10.0%) minorities (six blacks).[23]

The petitioners charge that LETA "has abandoned its EEO program" by not systematically contacting the four organizations listed in its program. The LETA EEO program indicates that although state-imposed budget constraints have curtailed its recruitments and/or advertising, these activities have been undertaken for LETA by the Louisiana Department of Civil Service. Also, the licensee explains in its opposition that "at appropriate times during the renewal term in question" it has sent notices to the four organizations listed in its program. It also states that it advertised extensively for engineering positions in trade publications and general circulation newspapers.

With respect to other affirmative efforts, LETA states that its Public Affairs Director is a black journalist and that four of the six Producer/Reporters working on projects are minorities.[24] Considering all relevant factors, we do not believe any substantial and material question of fact concerning LETA's EEO compliance has been raised requiring further inquiry. However, it appears that LETA has only sporadically sought referrals from the sources listed in its EEO program. While we are not unsympathetic to the licensee's financial condition, we do not believe that budget constraints are a legitimate excuse for nonperformance of its EEO obligations.[25] Moreover, the licensee's failure to keep track of the number of referrals it received during the license term reveals that the licensee did not collect the information necessary to assess its EEO efforts. Accordingly, reporting conditions will be imposed on the licensee in order to monitor the licensees adherence to its EEO program and its self-assessment. We also wish to emphasize that in our recently adopted amendments to the Broadcast Rules, *Broadcast EEO*, *supra*, at 3697, stations are required to "[u]se minority organizations, . . . media, educational institutions, and other potential sources of minority minority . . . applicants, to supply referrals *whenever* job vacancies are available in its operation." (47 CFR § 73.2080(c)(2)). (Emphasis added.)

(c) WYES-TV, New Orleans, Louisiana

Review of the licensee's amended EEO program indicates that the station contacted numerous sources for referrals, including the Urban League of New Orleans, the Louisiana Women's Bureau, four local universities, and one local community college.[26] However, the program does not reveal the number of referrals it obtained from these sources. With respect to training, the program reveals that the station hired two black males for on-the-job training positions, one as a Camera Operator, and the other as a Master Control Engineer, and maintained an internship program with three local universities.[27] Consistent with these efforts, four of the 18 persons hired during the year ending December 31, 1986, were minorities. With respect to the analysis of its EEO program, the licensee explains that due to staff shortages it was unable to track the number of referrals it obtained from its recruitment sources. It states, however, that it is implementing a system to enable it to track this information. Also, the licensee believes that a sufficient number of minorities are applying for available positions.

In comparison to the New Orleans MSA labor force showing 32.6% minorities (27.3% black), the station's renewal application employment profile shows that the overall staff of 55 employees includes 15 (27.3%) minorities (12 or 21.8% are black), and that the upper-level staff of 39 employees includes nine (23.1%) minorities (six or 15.4% of whom are black).[28] Previous license term employment reports show that black representation on the overall staff fluctuated from 17.1% in 1983 to 20.6% in 1985 to 17.5% in 1986 to 21.8% at the filing of its renwal application. Black representation in the upper-four positions varied from 12.3% in 1983 to 16.1% in 1985 to 11.4% in 1986 to 15.4% at renewal.

The petitioners argue that "three of the factors which apparently persuaded the Commission to grant the 1982 license renewal application without conditions are absent [from the station's EEO program] now." They contend that unlike the 1982 EEO record, the percentage of minority hires is no longer above parity; the station promoted no blacks in 1986; and the station apparently dropped its training program with the local cable franchisee. *See Louisiana / Mississippi Renewals*, *supra*, at 279 (1983). With respect to the station's license term employment statistics, the petitioners contend that the licensee has failed to provide an explanation for the dramatic decline in minority employment from 1985 to 1986. Finally, the petitioners assert that the station employs no blacks in managerial or professional positions.

In opposition, the licensee claims that its EEO program is "as strong now as it was in 1982." In support, it states it has continued the cooperative training arrangement with the local cable franchisee, which has led to the employment of several minorities in the broadcast and video industries, including a black female who was employed by the station. It notes that by the petitioners' own admission its employment of minorities in the top four job categories

from 1982 to 1986 has substantially increased in comparison to work force parity. With respect to the petitioners' allegation that the station has not employed blacks in positions within the officials and managers and professionals categories, the licensee points out that it has employed many minorities in responsible positions, including one Hispanic in the Officials and Managers category and one black in the professionals category.[29]

In making a determination of adherence to our EEO rule, the Commission looks at a station's overall employment, including all upper-four job categories, rather than only one job category. *E. g., Miami Valley Broadcasting Corp., supra.* Considering all pertinent circumstances, such as the absence of any evidence of discriminatory placement of employees, we do not believe that the licensee violated the nondiscrimination provision of our EEO rules. In the absence of any evidence suggesting discrimination on the part of the licensee, further inquiry is not warranted. However, in view of the licensee's failure to keep track of the number of referrals it obtained from its recruitment sources, it does not appear that the licensee possessed the necessary information to engage in an ongoing self-assessment of its EEO efforts. We are concerned that the the licensee took no steps to determine whether its own actions or efforts could be improved. In this regard, the licensee did not even address the decline in black employment from 1985 to 1986-- nor its efforts with respect thereto --in its program. In order to monitor the licensees' self-assessment so that it can revise its efforts as needed, we will impose reporting conditions on WYES-TV. We also admonish the licensee that in the future it should submit all the information requested in the station's renewal application and EEO reports. *Baltimore Metropolitan Broadcast Stations, supra.* Finally, we admonish the licensee for its carelessness in filling out its EEO program. *See Metrogeneral Communications of Nashville, Inc., supra.*

8. Accordingly, IT IS ORDERED, That the petition to deny filed by the National Black Media Coalition and others IS DENIED.

9. IT IS FURTHER ORDERED, That the renewal application for Station KTBS-TV IS GRANTED.

10. IT IS FURTHER ORDERED, That the license renewal applications for Stations KETS(TV), WLPB-TV and WYES-TV ARE GRANTED subject to the EEO conditions specified herein.

11. IT IS FURTHER ORDERED, That the licensees of Stations KETS(TV), WLPB-TV and WYES-TV file an original and one copy of the following information on May 1, 1989 and November 1, 1990:[30]

(a) For the May 1, 1989 report, a list of all job vacancies filled during the twelve months preceding April 1, 1989, and for the November 1, 1990 report, a list covering the period April 1, 1989 through September 30, 1990, indicating the job title and full or part-time status of the position, the race or national origin, sex and referral source of each applicant for each job and the race or national origin and sex of the person hired, FCC Form 395 classification of the position, the minimum job qualifications for each vacancy, and the qualifications of the job candidates;

(b) a list of employees as of April 1, 1989 and October 1, 1990 by job title indicating part-time or full-time status (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin; and

(c) details concerning the station's efforts to recruit for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

12. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail -- Return Receipt Requested one copy of this Memorandum Opinion and Order to the National Black Media Coalition and to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] The National Black Media Coalition (NBMC), headquartered in Washington, D.C., is a national association of black organizations and persons seeking additional black employment program service and ownership in the media. The petition was filed by NBMC and NAACP members in Arkansas and Louisiana who are viewers of the challenged stations.

[2] All submissions not authorized by Section 1.45 of the Commission's Rules will be considered only to the extent required by our public interest mandate.

[3] Initially, the petition was not supported by affidavits of persons who were viewers or residents of the service areas of the challenged stations. On May 13, 1987, NBMC submitted the affidavits of: Rev. Robert Willingham, President of the Little Rock Branch of the NAACP and a regular viewer of KETS(TV); George Eames, President of the Baton Rouge Branch of the NAACP; C.C. Campbell, Coordinator of the Louisiana Black Media Coalition and a regular viewer of WYES-TV; and Larry English, President of the Shreveport Branch of the NAACP. On July 10, 1987, NBMC submitted the affidavit of Rupert Richardson, President of the Louisiana State Conference of Branches of the NAACP.

[4] The petitioners did not challenge the licensees' employment practices with respect to women, which we have nevertheless examined and found adequate.

[5] In *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), (*Broadcast EEO*), we stated that all EEO programs would henceforth be thoroughly reviewed, regardless of whether a station's profile came within the processing guidelines, and that these guidelines were being used primarily for administrative efficiency.

[6] If factual questions remain after our initial review, we will conduct an inquiry or investigation. If, after this process, the factual questions persist and are substantial and material, we will designate the application for hearing. *Id.*

[7] Arkansas labor force data was obtained from "Labor Market Information for Affirmative Action Programs: 1984" prepared by the Arkansas Employment Security Division. Louisiana labor force data was obtained from "Manpower Information for Affirmative Action Programs: May 1986" prepared by the Louisiana Department of Labor's Office of Employment Security.

[8] The EEO program as originally submitted indicated that 10 persons were hired, five of whom were women. However, the licensee states in its opposition pleading that the hiring data inadvertently included an individual employed part-time. Thus, it appears that the hiring data only includes nine full-time employees.

[9] The preliminary statistical analysis results from a comparison of the percentage of *all* minorities on the station's staff with the percentage of *all* minorities in the relevant labor force. *Michael Mathiesen*, FCC 83-127, 55 RR 2d 997, 1002 (1983); *Storz Broadcasting Co.*, 88 FCC 2d 641, 642 (1981). However, blacks are the dominant minority in the labor force of each of the challenged stations, representing at least 83% of the minorities in the relevant markets. Because of this circumstance and because their treatment is the focus of the petition to deny, our principal concern is with each station's efforts with respect to blacks. *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) ; *Pyle Communications of Beaumont*, 2 FCC Rcd 1793 (1987), *appeal filed sub nom. Beaumont Branch of the NAACP and National Black Media Coalition v. Federal Communications Commission*, No. 87-1188 (D.C. Cir., April 27, 1987); *Metroplex Communications of Florida, Inc.*, 96 FCC 2d 1090 (1984). Of course, we also examine a licensee's EEO submissions to assure ourselves that appropriate affirmative efforts were made with respect to all minority group members. *Bilingual*, *supra* at 625 n.7.

[10] Since it appears that positive EEO efforts were made throughout the license term, consideration of post-term activities is appropriate. *Cf. Rust Communications Group, Inc.*, 73 FCC 2d 39, 53-54 (1979).

[11] We are aware that the station's employment data for 1986 shows that, despite a 24% minority applicant rate, none of the nine hires during the year were minorities. However, in view of the station's license term EEO record showing that 16.4% of the hires were minorities, and that offers of employment were extended to other minorities, we do not believe that the station's 1986 employment record raises a question of intentional discrimination which warrants further inquiry.

[12] We note that on May 19, 1987, the licensee filed an amendment to its renewal application proposing to expand its recruitment efforts to include the Shreveport Branch of the NAACP.

[13] The licensee files seven reports, one for each station, a report for its headquarters office, and one consolidated report. For simplification, we will refer to the state-wide system of stations as KETS or AETC.

[14] We have opted to compare AETC's staff with state labor force data because AETC regularly recruits from all parts of the state, and there is very little difference between state data and those of the Little Rock-North Little Rock MSA, where 80% of the AETC's staff is employed. *Compare Baltimore Metropolitan Broadcast Stations*, 89 FCC 2d 1183, 1188-90 (1982), with *The University of North Carolina at Chapel Hill*, 79 FCC 2d 248 (1980).

[15] AETC is a non-commercialentity and thus employs no sales staff.

[16] Initially, the licensee reported nine minorities on its overall full-time staff and seven minorities on its upper-level staff. However, the licensee states in its opposition that it inadvertently omitted a Pacific Islander female Production Assistant from its report. Accordingly, it submitted a corrected employment survey for the December 1986 payroll period.

[17] The petitioners charge that unexplained discrepancies exist between AETC's employment figures contained in its renewal application and the figures contained in the 1986 annual employment report. However, it appears that the discrepancy that the petitioners refer to is due to the petitioners having compared AETC's 1986 headquarters employment report with AETC's consolidated report contained in the renewal applications. Unlike the headquarters report, which includes only those persons employed at the Conway, Arkansas office, the consolidated report includes all persons employed at both the headquarters and the five stations that constitute AETC.

[18] In *Bilingual*, *supra* note 9, the court stated a substantial statistical disparity between the available minority workforce and a station's minorityemployment, coupled with a languishing affirmative action plan, raises questions as to whether the station's poor EEO performance is due to inadvertence or to intentional discrimination. The court made clear, however, that the Commission could gather more information regarding these issues through its own investigation. *Id.* at 630. *See National Black Media Coalition v. FCC*, 775 F. 2d 342, 358 (D.C. Cir. 1985).

[19] On June 4, 1987, the Commission received a complaint against AETC filed by a former employee, alleging that the licensee discriminates against minorities. However, the complaint is unsupported by the affidavit of someone professing to have personal knowledge of the facts alleged. Moreover, none of the personnel decisions cited include allegations suggesting that any act or omission was premised on illegal discrimination. Accordingly, no substantial and material question of discrimination is raised by these allegations.

[20] The licensee files seven reports, one for each station and one consolidated report. For simplification, we shall refer to the stations as LETA.

[21] The licensee's EEO program initially reported that seven persons were hired, of whom four were minorities. However, the licensee explains that it inadvertently included a person who was hired outside of the reporting period. Accordingly, the licensee filed an amendment to its renewal application on June 1, 1987 to correct the error.

[22] *See supra* note 14. Like AETC, LETA regularly recruits state-wide and there is little difference between state labor force data and those of the Baton Rouge MSA.

[23] With respect to LETA'S employment profile throughout the license term, the petitioners maintain that the non-clerical staff increased from 45 to 70 persons while the number of minorities in those positions decreased from eight to five. However, as the licensee has pointed out, the apparent decrease in minority employees in upper-level positions is due to the petitioners having erroneously compared LETA's consolidated renewal application employment report with earlier license term employment reports for Station WLPB-TV.

[24] LETA notes that while the Public Affairs Director holds a permanent full-time position, the remainder of its program production staff, with the exception of the Minority Programming Director, are temporary employees and are not reported in its employment reports or EEO program.

[25] As the petitioners have pointed out, it would not have been an unreasonable expense for the licensee to mail notices for the six vacancies in 1986 to the four recruitment sources or notify these sources by phone.

[26] Originally, the licensee's EEO program indicated that its recruitmentsources included Minority Women Employment, New Orleans Blacks in Communications, National Organization for

Women, and the Louisiana Employment Service. However, the licensee states in its opposition pleading that in reviewing its EEO records it discovered that inclusion of these recruitment sources in its EEO program was incorrect. Accordingly, the licensee amended its renewal application to reflect accurately its license term efforts.

[27] Although the EEO program initially indicated that the station maintained an internship program with Tulane University and Newcomb College, the licensee's amended EEO program reveals that these educational institutionsdid not participate.

[28] Originally, the licensee's renewal application EEO program indicated that the station employed a Hispanic female professional. However, the licensee states in its opposition pleading that the individual is, in fact, a black female professsional who is employed as a Graphic Artist.

[29] In its reply the petitioners charge that the amendments to the licensee's EEO program are evidence that it deliberately misrepresented its EEO efforts. According to the petitioners, it is inconceivable that the senior management official who prepared the EEO program and whose work is presumably monitored by the President/CEO could have made this many errors accidentally. In addition, the petitioners charge that the licensee's opposition pleading containing the amendment misrepresents its contacts with Southern University and Delgado Community College, based on letters from those organizations stating that they had no record of contacts from the licensee. In its supplemental opposition pleading, the licensee explains that it voluntarily corrected the inaccuracies in its renewal application and brought them to the Commission's attention once they were discovered. Moreover, it argues that it did contact the two colleges listed in its amended renewal application and it provides copies of letters from the Director of Career Counseling and Placement at Southern University and the Director of Job Placement Services at Delgado Community College confirming that they had received job notices from the station. Considering the information submitted, we do not believe that a substantial and material question of misrepresentation or lack of candor exists warranting further inquiry. However, we admonish the licensee for its carelessness, and we expect that future filings will be accurate when initially submitted.

[30] Upon submission of the first report, the Commission's staff will review each licensee's EEO performance, and if it is determined that a licensee has developed an effective EEO program, the staff will advise the licensee that no further report will be required. On the other hand, if a licensee's report indicates that additional monitoring is warranted, the second report will be required.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of Certain Broadcast Stations Serving Communities in the State of Florida

MEMORANDUM OPINION AND ORDER

Adopted: February 25, 1988 **Released: April 4, 1988**

BY THE COMMISSION:

1. The Commission has before it for consideration: (i) a "Petition to Deny" filed January 2, 1987, by the National Black Media Coalition and the Florida State Conference of Branches of the NAACP (hereafter "Petitioners)[1] against the license renewal applications of six broadcast stations serving various communities in the State of Florida;[2] (ii) opposition pleadings from the licensees; (iii) the petitioners' reply; and (iv) various related pleadings. [3]

2. *PROCEDURAL MATTERS.* With respect to standing, the petitioners have submitted affidavits from NAACP members who are listeners or residents of the service areas of the challenged stations.[4] However, the affidavits were not timely filed, and the explanation for their late submissions, while not suggestive of abuse, reflects a continuing lack of diligence in complying with our procedural rules. In this regard, we note that NBMC has often failed to file supporting affidavits to petitions to deny in a timely fashion. *E. g., Texas Broadcast Renewals*, 99 FCC 3d 377 (1984); *KDEN Broadcasting Company*, FCC 84-159, 55 RR 2d 1311 (1984), *recon. den.* FCC 85-214, released April 30. 1984, *aff d sub nom. National Black Media Coalition and the Urban League of Metropolitan Denver v. FCC*, No. 85-1317 (D.C. Cir. May 14, 1986); *Renewals of Indiana, Kentucky and Tennesee Broadcast Stations*, FCC 83-574, 54 RR 2d 1473 (1983); *Auburn Broadcasting Company*, FCC 85-31, released January 24, 1985. Therefore, although we will accept the late-filed affidavits *nunc pro tunc*, *Malrite of New York*, 71 FCC 2d 241, 242 (1979), we put NBMC on notice that routine late filings for nonsubstantial reasons will not be countenanced.

3. *PLEADINGS.* The petitioners charge that the EEO programs and employment profiles of each of the stations reveal that the licensees have not complied with the Commission's EEO rule (Section 73.2080) or policies with respect to blacks and other minorities.[5] The petitioners contend that the challenged stations failed to have more than token employment of minorities during most of the 1982-1987 license term and that the proposed EEO programs submitted by the licensees appear ineffective. The petitioners, therefore, request that the Commission investigate the EEO policies of the challenged stations, designate their applications for an evidentiary hearing, and deny each of the applications.

4. The licensees deny all the general allegations and maintain that the petitioners have failed to present evidence of noncompliance with the Commission's rules or policies. The licensees, therefore, request renewal of license.

5. *DISCUSSION.* Section 73.2080 of the Commission's Rules requires that broadcast licensees refrain from employment discrimination as well as establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. The Commission evaluates the licensee's efforts to implement its affirmative action program by reviewing all relevant and material information, including the composition of the station's workforce, the composition of the local labor force, the description of the station's EEO program and policies, recruitment and promotion data, and any EEO complaints filed against the station or licensee. In reviewing the station's employment profile, the Commission compares the station's workforce with the area's available labor force. Although all EEO programs are reviewed, a closer look is generally given to those stations not meeting the Commission's internal processing guidelines.[6] The numbers and percentages are simply analytical aids, however, and are not determinative. As emphasized above, in the absence of evidence of discrimination, our primary concern is the broadcaster's efforts. Thus, it would be an error for a broadcaster to assume it has reached a "safe harbor" once it meets the guidelines. Every broadcaster is required to make affirmative efforts and to refrain from discrimination. When the evidence as a whole indicates that the licensee is complying with our EEO rule and policies, the pending application is granted, if otherwise appropriate. When the evidence indicates noncompliance by the licensee, the Commission may impose prospective sanctions such as the submission of periodic progress reports and/or renewal for less than a full term.[7] For less serious cases, the Commission may, in its discretion, simply issue warnings.

6. Applying the foregoing principles, we have evaluated the stations' EEO efforts in light of their submissions, the petitioners' arguments, and the relevant labor force data for women and minorities.[8] The stations' EEO performances indicate that the licensees did not fully comply with the Commission's EEO rule during the 1982-1987 license term. The licensees' EEO records revealed few recruitment practices which could be viewed as likely to increase the flow of minority applicants, particularly for upper-level positions. Thus, although the stations proposed in their pleadings to contact additional recruitment sources and now report increases in minority employment in 1987, we believe that these post-term changes are a direct consequence of the petitioners' challenge, since the licensees could have made these EEO efforts during the license term. Accordingly, to the extent we are considering the 1987 figures, we are doing so only to fashion the appropriate remedy. *Texas Broadcast Renewals*, *supra* at 383.

(a) WTGL-TV, Cocoa.

Review of the licensee's EEO program indicates that it contacted Frontline Outreach, a black organization, but no referrals were obtained. The licensee also utilized several conventional recruitment sources, including *Broadcasting Magazine* (three referrals), *Today* newspaper (four referrals), and the state employment service (no referrals). In addition, the station received nine referrals collectively from the *Calvery Assembly Weekly* newsletter, Florida Beacon Bible College, and the Heritage School of Communication. The EEO program indicates that an internship program with a local college resulted in the employment of one intern, but it is unclear whether the

individual was a minority. Of the nine hires during the twelve-month reporting period, none were minorities. The licensee acknowledges that a sufficient number of qualified minorities are not applying for available positions and it proposes to expand its recruitment sources to include the NAACP and black colleges. The Melbourne-Titusville-Palm Bay MSA, of which Cocoa is a part, includes 10.1% minorities (7.4% black,[9] 1.8% Hispanic, and 0.9% other). The WTGL-TV renewal application employment report reveals that none of the 14 full-time employees, including the 12 employees in upper-four positions, were minorities. Previous license term employment reports show one minority employed as a technician in 1985 and 1986 and one black, a male technician, employed in 1983, on a full-time staff that decreased from 18 in 1983 to 12 in 1986, and an upper-level staff that decreased from 13 in 1983 to seven in 1986.[10]

The petitioners contend that the licensee's statement in Section X of its EEO program that it is "continuing" to contact various minority groups raises a question of candor because the licensee's EEO program shows that it only contacted one minority organization. In addition, the petitioners charge that the licensee's reliance on non-secular referral sources constitutes racial and religious discrimination since it appears that the station "only considers Christian Fundamentalists for employment and thus does not feel many blacks would be eligible to work there." In opposition, the licensee refutes the lack of candor allegation, pointing out that in addition to contacting Frontline Outreach, the minority recruitment source listed in its EEO program, it also sought referrals from a local black journalism group.[11] With respect to the charge that it discriminated against blacks, the licensee asserts that it employed minorities throughout the license term. It notes that the black male listed as a technician in its 1983 employment report held positions as a Camera Operator, Floor Director, Master Control Operator, and Production Assistant from August 1982 to March 1983; a black male was employed part-time as a Master Control Operator trainee from July 1983 to October 1983; and a black male was hired full-time as a Producer in December 1986.

With respect to the allegation that the licensee engaged in religious or racial discrimination, the petitioners have presented no evidence showing that the licensee relied exclusively on religious recruitment sources or that anyone was not hired because of his or her religious background. As to race, the licensee's record indicates that it contacted at least two black-oriented recruitment sources, and, in fact, employed blacks and other minorities during the license term, including individuals in the top-four job categories. Moreover, in light of the small size of the station, as well as the relatively low percentage of blacks and other minorities in the labor force, we do not believe that there was a substantial disparity between the licensee's employment figures and labor market figures (as reflected in our processing guidelines).[12] Thus, we do not believe that a substantial and material question of racial or religious discrimination, or lack of candor, has been raised. Nevertheless, it does not appear that the licensee engaged in on-going self-assessment. Blacks were absent from the station's full-time staff for most of the license term, yet the licensee did not take significant steps to determine whether its own actions or efforts could be improved until after it filed its 1986 renewal application in October 1986.[13] Indeed, the licensee does not even address its black employment situation -- or its efforts with respect thereto -- in its program. Accordingly, we believe it appropriate to monitor the licensee's efforts and its self-assessment to ensure that these practices are an on-going and integral part of the licensee's EEO program. For this reason, reporting conditions will be imposed upon the licensee.

(b) WXEL-TV, West Palm Beach.

Review of the EEO program indicates that the licensee contacted the Urban League of Palm Beach County (no referrals), Hispanic Human Resources (one referral), and the state employment service (three referrals). In addition to providing on-the-job training, the licensee conducted a production training program with Western Carolina University, although it is unclear whether minorities benefited from these programs. The West Palm Beach-Boca Raton-Delray Beach MSA includes 20.2% minorities (13.8% black, 5.7% Hispanic, and 0.7% other). The EEO program shows that two (8.3%) of the 24 persons hired during the September 1, 1985 to August 31, 1986 period were minorities. The station's 1986 license term employment report shows a full-time staff of 22 persons, including two (9.1%) minorities (both of whom are black), while none of the upper-level staff of 15 was a minority. License term reports for 1984 and 1985 reveal a similar profile on the overall staff while the upper-level staff included a black male listed as an official and manager.

The petitioners note that the only blacks employed by the station in 1986 held jobs as a secretary and as a janitor, and argue that a *Bilingual* investigation is necessary to determine whether the absence of minority employment in the upper-level job categories resulted from intentional discrimination. We disagree because there is no evidence of discrimination. Moreover, the licensee's record indicates that the licensee contacted black and other minority-oriented recruitment sources, and, in fact, hired or employed blacks and other minorities during the term, including individuals in the top-four job categories. Nonetheless, we are concerned about the extent of the licensee's recruitment and employment efforts. The licensee claims that in addition to regularly contacting the recruitment sources noted in its EEO program, it frequently advertised job openings in various publications and contacted the Office of Minority Placement of the Corporation for Public Broadcasting and the Southern Educational Communications Association. It acknowledges, however, that it stopped contacting local schools. The licensee now proposes to resume contacts with local schools and to expand this program to include all major state universities, such as Florida A & M and Bethune-Cookman, two predominantly black institutions. The station also reports hiring a Hispanic male as a Marketing Associate in December 1986.[14]

Considering all pertinent circumstances, and the absence of evidence suggesting that discrimination against blacks occurred, the station's overall record raises no substantial and material question of fact warranting further inquiry. However, it appears that the licensee made few efforts to assure that blacks were in the applicant pool for upper-level positions. The efforts cited produced few applicants, and there is no indication that blacks or other minorities were regularly considered as candidates for upper-level jobs. Moreover, it does not appear that the licensee regularly evaluated its EEO efforts. In this regard, the licensee does not indicate whether it ever analyzed the productiveness (or lack thereof) of its recruitment sources, nor does

the licensee explain why it stopped contacting local schools. Accordingly, we believe it appropriate to monitor the licensee to ensure that its proposal to contact state and local sources of minority applicants is carried out and that it engages in ongoing self-assessment of its EEO program. Further, because 10 of the station's 22 full-time employees are classified as officials and managers, an unusually high number for a station of this size, we will require that the licensee submit information to ensure that all jobs are properly classified.

(c) WTWC-TV, Tallahassee.

The station's EEO program indicates that it contacted Florida A & M University, a local school with a predominantly black enrollment, but no referrals were obtained. Other referral sources listed include the state employment service (three referrals), and three private employment agencies (five referrals). Additionally, the station conducted an internship program with two state universities which resulted in the employment of three interns, one of whom was black. The EEO program also shows that two (7.7%) of the 26 persons hired during the year ending September 30, 1986, were minorities. The licensee acknowledges that a sufficient number of qualified minority and female applicants are not applying for available positions and proposes a new source, Florida A & M University, a source that it was supposedly already utilizing. Comparison of the station's full-time staff[15] with the Tallahassee MSA labor force of 27.6% minorities (25.7% black) shows that the level of minority representation decreased from 16.1% in 1984 to 14.3% in 1985 to 8.3% in 1986.[16] Minority representation in the top-four job categories decreased from 17.9% in 1984 to 8.7% in 1985, then increased slightly to 9.5% in 1986.

The petitioners note that, throughout the license term, all minority employees in upper-level positions were technicians. Citing *CarolinaRadio of Durham, Inc.*, 74 FCC 2d 571 (1979), the petitioners argue that the absence of minorities in decision-making positions in management, professional, and sales jobs evidences noncompliance with the Commission's EEO rule.[17] The licensee asserts that it actively recruits blacks and females, and, as a consequence, the station's statistical employment record has generally exceeded the FCC's processing guidelines.

As we noted in *Carolina Radio*, *supra*, the Commission looks at a station's overall employment, including all upper-four job categories, rather than only one job category in making a determination of adherence to our EEO rule. *See , e. g., Miami Valley Broadcasting Corp.*, 86 FCC 2d 776 (1981). In view of the station's willingness to hire, employ and provide internships to minorities, including blacks, we do not believe that a substantial and material question of fact requiring further inquiry concerning EEO compliance exists.[18] However, the station's EEO program suggests that little effort was made to apprise potential sources of minority applicants about available positions or to evaluate the productiveness of its recruitment efforts. In this regard, the licensee's reference to Florida A & M as an existing minority recruitment source which did not produce referrals and as a new source to be used because a sufficient number of qualified minority applicants were not applying, coupled with the decline in minority representation at the station, suggests that the licensee was inattentive to its recruitment and self-assessment responsibilities and may not have made additional recruitment efforts absent the filing of the petition to deny.[19] Indeed, the licensee does not even address the decline -- or its efforts with respect thereto -- in its program. Finally, with respect to the licensee's assertion that the station's statistical employment record has generally exceeded our processing guidelines, we wish to stress to the licensee that meeting or exceeding the guidelines is not a "safe harbor" and neither exempts its program from review by the Commission nor permits it to slacken or cease its recruitment and other efforts. *See Broadcast EEO*, *supra*, at 3974. We expect licensees' affirmative recruitment and promotion efforts to continue even after our processing guidelines are met. Accordingly, we will impose reporting conditions upon the licensee to assist us in monitoring its efforts to ensure that the expanded recruitment plan is implemented and that an on-going self-evaluation is conducted.

(d) WNFT-TV, Jacksonville.

Review of the EEO program indicates that the licensee contacted several sources for referrals, including the city's only black college (four referrals), a business school with a large minority enrollment (one referral), and a local university (11 referrals). In addition, it obtained numerous referrals from general recruitment sources, such as employment services (27 referrals), and magazines and newspapers (150 referrals). Of the 18 hires during the year ending December 1, 1986, two (11.1%) were minorities. With respect to the station's on-the-job training efforts, the EEO program reveals that several minority employees who received training, including a black male, were promoted to management positions. Minorities comprise 21.3% of the Jacksonville labor force (18.6% black, 1.7% Hispanic, and 1.0% other). Review of the station's 1986 employment report reveals that the full-time staff of 46 persons included five (10.8%) minorities, four (8.7%) of whom are black, while its upper-level staff of 36 persons included three (8.3%) minorities, two (5.6%) of whom are black. Previous license term employment reports show that the level of minority representation on the full-time staff has decreased from 13 (32.5%) of 40 in 1982 to six (14.0%) of 43 in 1985, while minority representation in the top-four job categories has decreased from 12 (36.4%) of 33 in 1982 to four (12.5%) of 32 in 1985. Similarly, the level of black representation on the staff decreased from 10 (25.0%) of 40 in 1982 to four (9.3%) of 43 in 1985, while black representation in the upper-four job categories decreased from nine (27.3%) of 33 in 1982 to five (6.3%) of 32 in 1985.

The petitioners contend that the "dramatic decline" in WNFT's minority representation is evidence that the licensee "trashed the aggressive EEO program it promised to use during the 1982-1986 license term." The petitioners point out that a comparison of the station's 1982 EEO program with its recent EEO program reveals that the licensee no longer utilizes a black organization, two black newspapers, and the state employment service, as recruitment sources that generated a total of 166 referrals in 1982.

In rebuttal, the licensee states that it hired "an average of 50 percent more minorities than required under FCC guidelines," a statistic not reflected in the station's employment profile. However, no explanation is provided for the declining minority representation throughout the license term. Nevertheless, in its opposition pleading, the licensee proposes to contact local chapters of the Urban League and the NAACP, the *Florida Star*, the Florida NAACP, and the National Black Media Coalition. In re-

ply, the petitioners state that the licensee has misconstrued the Commission's EEO guidelines as a quota which, once attained, relieves it from further EEO obligations. They conclude that the decline in the station's EEO efforts and results raise questions regarding the licensee's adherence to the Commission's EEO rule which must be investigated.

Although the licensee's employment profile for the license term shows that the representation of blacks and other minorities on the station's staff declined from 1982 to 1986, there is no evidence to suggest that the decline was due to discrimination. *See Storz Broadcasting Co.*, 58 RR 2d 823 (1985). The station continued during its license term to contact some black and other minority recruitment sources and to hire or employ blacks and other minorities, including some in the top-four job categories. Thus, there is no need to hold a hearing or to conduct an inquiry. Nevertheless, a comparison of the licensee's EEO efforts during the previous term with its most recent efforts shows that the station's recent recruitment contacts did not include sources which had proven to be productive in referring minorities. This, in turn, may have led to a reduction in the number of minorities employed, particularly in upper-level positions. While we note that in response to the petition to deny, the licensee has proposed to contact additional recruitment sources, some of which it had previously utilized, we are concerned that productive recruitment sources were dropped from the station's EEO program in the past and that no proposal was made to contact additional sources during the license term despite the steady and significant decline in the employment of blacks. When these facts are coupled with the licensee's statement that it hired "an average of 50 percent more minorities than required under FCC guidelines," it appears that the licensee focused undue attention on only one aspect of the employment process, *i. e.*, hiring, and, even there, did so in an incomplete and superficial manner. We wish to emphasize that we expect licensees' affirmative recruitment and promotion efforts as well as their on-going assessment of those efforts to continue *regardless* of whether our processing guidelines are met. They are simply processing guidelines and nothing more. They are not quotas nor do they establish upper limits for minority or female employment. There is no reason for a licensee's affirmative efforts to diminish at 50%, 75% or even 90% of parity. Accordingly, reporting conditions will be imposed as a means of monitoring the licensee's recruitment and promotion efforts.

(e) WJTC(TV), Pensacola.

The station's EEO program reveals that the licensee contacted and obtained referrals from two private agencies, a women's organization, two industry councils, the state employment service, and five colleges. However, the only recruitment source contacted which was specifically directed toward blacks produced no referrals. The station's EEO program shows that of the 37 persons hired during the reporting period, five (13.5%) were minorities. In addition, three minorities received on-the-job training and two minorities from state universities received internships with the station. The licensee acknowledges that a sufficient number of qualified women and minorities were not applying for available positions. It has proposed to contact the Pensacola Black Ministers Alliance. The Pensacola MSA includes 17.5% minorities of whom 14.3% are black. The renewal application EEO program shows that none of the 31 persons employed full-time, including the 28 persons in upper-level positions, were minorities. Review of the station's 1985 Annual Employment Report indicates that the full-time staff of 30 persons included one (3.3%) minority while the upper-level staff of 27 also included the one (3.7%) minority, a black male technician. The 1986 report indicates that the full-time staff of 45 persons included three (6.6%) minorities (one black and two Hispanics), while the upper-level staff of 38 persons included two (5.3%) minorities (one black and one Hispanic).[20]

The petitioners charge that the licensee may have discriminated against minorities because the three minority employees listed in the January 1986 report are no longer reported in the renewal application employment report. In response, the licensee denies that it discriminated against minorities. It explains that due to financial difficulties, full-time employees were eliminated in the traffic and engineering departments and replaced by part-time employees[21] and the station's local evening news program was terminated effective May 31, 1986. As a result of not filling vacancies other than for sales account executive positions, the licensee notes that the station's staff declined from a high of 49 full-time employees in May 1986 to 29 full-time employees in February 1987, and that the impact of the staff reduction fell on whites and minorities alike.[22]

With respect to the petitioners' suggestion that discrimination may have occurred, the licensee's unrebutted explanation of the circumstances surrounding the departure of the three employees identified in the petition as well as its substantial employment cutbacks resulting from financial difficulties indicate that unlawful discrimination did not occur. Accordingly, although the statistical disparity between its employment figures and labor market figures (as reflected in our processing guidelines) is troubling and the deficiencies in the licensee's EEO program discussed below might otherwise lead us to inquire further,[23] the licensee's explanation for its situation leads us to conclude that under the circumstances of this case, there is no substantial and material question of intentional discrimination requiring further inquiry. *See Storz Broadcasting Co., supra.* Nonetheless, we do not believe that the licensee's efforts to seek out blacks, the dominant minority group in the area, were sufficient. The station's EEO program shows that while it obtained many referrals from general recruitment sources, insufficient recruitment effort was specifically directed toward sources likely to refer qualified black applicants. As a consequence, the station's employment profile shows that despite a sizeable black presence in the available labor force, black representation on the full-time staff continually declined. While the licensee points out that the station's "high water mark" of 49 full-time employees included four minorities, it does not reveal whether any of the four minorities, other than the one male technician reflected in its 1985 and 1986 employment reports, were black. It thus appears that black representation on the station's staff, prior to the personnel cutbacks, was at its lowest when the number of employees was at its highest. While we are mindful that the licensee proposes to contact additional recruitment sources,[24] we believe that reporting conditions are necessary to ensure that its proposal is fully implemented and that its efforts are maintained.

7. Accordingly, IT IS ORDERED, That the petition to deny filed by the National Black Media Coalition and the Florida State Conference of Branches of the NAACP IS DENIED.

8. IT IS FURTHER ORDERED, That the license renewal applications for Stations WTGL-TV, WXEL-TV, WTWC-TV, WNFT-TV and WJTC(TV) ARE GRANTED, subject to the EEO conditions specified herein.

9. IT IS FURTHER ORDERED, That the licensees of Station WTGL-TV, WXEL-TV, WTWC-TV, WNFT-TV and WJTC(TV) file an original and one copy of the following information on May 1, 1989 and November 1, 1990:[25]

(a) For the May 1, 1989 report, a list of all job vacancies filled during the twelve months preceding April 1, 1989, and for the November 1, 1990 report, a list covering the period April 1, 1989 through September 30, 1990, indicating the job title, FCC Form 395 classification, minimum job qualifications and full or part-time status of the position, the race or national origin, sex, referral source, and qualifications of each applicant for each job, and the race or national origin and sex of the person hired;

(b) a list of employees as of April 1, 1989 and October 1, 1990, identifying the employee by job title, FCC Form 395 classification indicating part-time or full-time status (ranked from the highest paid to the lowest paid), and sex and race or national origin; and

(c) details concerning the station's efforts to recruit for each position filled during the period specified, including identifications of sources used and indicating whether any of the applicants declined actual offers of employment.

10. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail--Return Receipt Requested one copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] The National Black Media Coalition (NBMC), headquartered in Washington, D.C., is a national association of black organizations and persons seeking additional black employment, program service and ownership in the media. The petition was filed by NBMC and NAACP members who are viewers of the challenged stations.

[2] The challenged license renewal applications include: in Cocoa, WTGL-TV (File No. BRCT-861001KP), licensed to Good Life Broadcasting, Inc.; in Jacksonville, WNFT-TV (File No. BRCT-861001KW), licensed to North Florida 47, Inc.; in Pensacola, WJTC(TV) (File No. BRCT-861001LA), licensed to Carnex TV, Inc.; in Tallahassee, WTWC-TV (File No. BRCT-86100KS), licensed to Holt Robinson Television, Inc.; and in West Palm Beach, WXEL-TV (File No. BRET-861001KN), licensed to South Florida Public Telecommunications,Inc. The petition to deny also sought action against Station WIYE-TV, Leesburg, Florida. The challenge against that station's license renewal application was withdrawn. Nonetheless, the Commission's staff, pursuant to delegated authority, reviewed the station's EEO performance and determined that no further inquiry was warranted.

[3] All submissions not authorized by Section 1.45 of the Commission's Rules will be considered only to the extent required by our public interest mandate.

[4] Initially, the petition was supported only by the affidavit of Pluria Marshall, who is Chairman of the National Black Media Coalition (NBMC) and a resident of Silver Spring, Maryland. On March 2, 1987, NBMC submitted the affidavits of: Clarence Rowe, President of the Central Brevard County Branch of the NAACP and a regular viewer of WTGL-TV; Willye F. Dennis, President of the Jacksonville Branch of the NAACP; Robert Walker, President of the Pensacola Branch of the NAACP; Anita Darius, President of the Tallahassee Branch of the NAACP; and Louise E. Buie, President of the West Palm Beach Branch of the NAACP. NBMC explained that due to the holidays, it was unable to submit the affidavits in time for the filing of the instant petition.

[5] The petitioners did not challenge the licensees' employment practices with respect to women, which we have examined and found adequate.

[6] In *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), (*Broadcast EEO*), we stated that all EEO programs would henceforth be thoroughly reviewed, regardless of whether a station's profile came within the processing guidelines, and that these guidelines were being used primarily for administrativeefficiency.

[7] If factual questions remain after our initial review, we will conduct an inquiry or investigation. If, after this process, the factual questions persist and are substantial and material, we will designate the application for hearing. *Id.*

[8] Florida labor force data was obtained from the EEOC's Office of Program Research "1980 Census Data Report."

[9] The preliminary statistical analysis results from a comparison of the percentage of *all* minorities on the station's staff with the percentage of *all* minorities in the relevant labor force. *Michael Mathiesen*, FCC 83-127, 53 RR 2d 997, 1002 (1983); *Storz Broadcasting Co.*, 88 FCC 2d 641, 642 (1981). However, blacks are the dominant minority in the labor force of each of the challenged stations, representing at least 68% of the minorities in the relevant markets. Because of this circumstance and because their treatment is the focus of the petition to deny, our principal concern is with each station's efforts with respect to blacks. *Bilingual - Bicultural Coalition on the Mass Media Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) ; *Pyle Communications of Beaumont*, 2 FCC Rcd 1793 (1987), *appeal filed sub nom. Beaumont Branch of the NAACP and National Black Media Coalition v. Metroplex Communications of Florida, Inc.*, 96 FCC 2d 1090 (1984). Of course, we also examine the licensees' EEO submissions to assure ourselves that appropriate affirmative efforts were made with respect to all minority group members. *Bilingual, supra* at 625 n. 7.

[10] Originally, the 1985 and 1986 Annual Employment Reports submitted by the licensee did not list any minorities. However, the licensee states in its opposition pleading that it recently learned that a female employed as a Master Control Operator at the station from January 1985 to April 1986 was an American Indian. Accordingly, the licensee filed amended Annual Employment Reports for 1985 and 1986 to correct the error.

[11] In support, the licensee provides a copy of a letter dated June 19, 1985, to the Central Florida Association of Black Journalists in which it sought the names of qualified minority and female applicants. The letter, however, does not refer to any particular job opening.

[12] In *Bilingual, supra* note 9, the court indicated that a substantial statistical disparity between the available minority workforce and a station's minority employment, coupled with a languishing affirmative action plan, raises a question as to whether the station's poor EEO performance is due to inadvertence or to intentional discrimination, which has to be resolved before license renewal is appropriate. The court left the manner of resolving the question to our discretion.

[13] The licensee indicated in its opposition dated April 17, 1986, that it "has or will" recruit from local colleges including, Bethune-Cookmanand Florida A & M University, and it provides copies of letters that were sent to these sources dated January 29, 1987 and April 14, 1987. As a consequence of these efforts, the licensee offered a black female full-time position as a Master Control Operator on April 14, 1987, and hired a black female on April 27, 1987 as an Associate Producer/On-Air Talent Writer.

[14] On December 30, 1986, the licensee filed an amendment to its renewal application showing that its overall full-time staff of 23 included three minorities, two of whom were black, while its upper-level staff of 16 included one minority.

[15] We note that the station began operations in 1983.

[16] Initially, the licensee's employment reports showed that it employed four minorities in 1984 and three minorities in 1985. In the opposition pleading, however, the general manager of the station explains that his review of the payroll records reveals that a black male technician was inadvertently omitted from the stations 1984 and 1985 reports. Therefore, the licensee submitted amended Annual Employment Reports for 1984 and 1985. In addition, the licensee notes that as of the end of the license term but prior to its receipt of the petition to deny, the full-time staff of 32 employees included seven minorities, five of whom were black.

[17] The petitioners also claim that the minority employment records of two AM/FM combinations -- WHHY-AM/FM in Montgomery, Alabama and WHSY-AM/FM in Hattiesburg, Mississippi -- that are owned by the licensee suggest that the licensee violates the Commission's EEO rules wherever it operates. Since the license renewal applications of these stations are not now before us, this allegation will have no bearing on our review of the instant application. *See Equal Employment Violation*, 56 RR 2d 445 (1984); *Richey Airwaves, Inc.*, 53 RR 2d 330 (1983); *and Chicago Metropolitan Broadcast Stations*, 89 FCC 2d 1031, 1034 (1982). We are not herein deciding whether poor EEO performance at any one particular station will be relevant to future license renewal evaluations for other stations licensed to the same licensee.

[18] On July 20, 1987, the licensee amended its EEO program to note that a complaint alleging unlawful and discriminatory employment practices was filed with the Florida Commission on Human Relations and the EEOC (Case 87-3097, EEOC No. 15D870157). The Florida Commission on Human Relations has dismissed the charge, while the EEOC has not rendered a finding. Consistent with our practice, we shall allow the administrative process to run its course and shall take action, if appropriate, after a final determination has been reached.

[19] The licensee states in its opposition that it has recently expanded its recruitment efforts to include the NAACP and the *Capitol Outlook*, a black newspaper.

[20] WJTC(TV) began operations on December 24, 1984.

[21] In this regard, the licensee states that a full-time receptionist was replaced with two part-time employees, one of whom was black and was hired through its contacts with a private investment council.

[22] With respect to the three minorities who left the station, the licensee explains that one was terminated as a result of the news program's cancellation, one resigned to return to graduate school, while the third completed an internship with the station and returned to his former place of employment.

[23] *Bilingual*, supra note 9.

[24] In its opposition pleading, the licensee proposes to contact the Pensacola Branch of the NAACP; the Chairman of the Escambia County Commission, who is black; and the President of the Pensacola Alumni Council, which is said to be a cooperative effort between local members of black fraternities and sororities and two local colleges to provide job training resources and job opportunities for young blacks. Moreover, the licensee's later submissions indicate that a black male was hired on June 1, 1987, as a Sales Account Executive but as of August 31, 1987, was no longer employed by the station, and that a black male was hired on September 28, 1987, as a Sales Account Executive.

[25] Upon submission of the first report, the Commission's staff will review each licensee's EEO performance, and if it is determined that a licensee has developed an effective EEO program, the staff will advise the licensee that no further report will be required. On the other hand, if a licensee's report indicates that additional monitoring is warranted, the second report will be required.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-123

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Grover City, California) — RM-5939

NOTICE OF PROPOSED RULE MAKING

Adopted: February 25, 1988; Released: April 5, 1988

By the Deputy Chief, Policy and Rules Division:

1. R & L Broadcasters (petitioner), licensee of Station KOSZ(FM),[1] (Channel 297B1), Grover City, California, has filed a petition for rule making seeking to substitute Channel 297B for Channel 297B1 and to modify its Class B1 facilities accordingly.

2. A staff engineering study has determined that Channel 297B can be allotted to Grover City, California, at the petitioner's present transmitter site,[2] consistent with the minimum distance spacing requirements specified in Section 73.207(b) of the Commission's Rules.

3. In view of the above, and in accordance with established Commission policy, we shall propose to modify the license of Station KOSZ(FM), as requested by petitioner, in the event Channel 297B is substituted for Channel 297B1 at Grover City, California. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the Grover City modification proposal, nor require that the petitioner demonstrate the availability of an additional equivalent class of channel.

4. Accordingly, in order to provide Grover City, California, with a wider coverage FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Grover City, California	297B1	297B

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 26, 1988,** and reply comments on or before **June 10, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

R & L Broadcasters
Attn: Rod B. Funston
1234 Ramona Avenue
Grover City, CA 93433-2217

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Formerly Station KLOI(FM).

[2] Petitioner's present transmitter site is located at the following reference coordinates: 35-06-25; 120-30-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-125

In the Matter of

Amendment of Section 73.202(b), RM-6140
Table of Allotments,
FM Broadcast Stations.
(Kailua-Kona, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 4, 1988; Released: April 5, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed by Fakas Broadcasting (petitioner), permittee of Station KLUA(FM), Kailua-Kona, Hawaii, which seeks to substitute Channel 230C1 for Channel 228A at Kailua-Kona. Petitioner also requests modification of its construction permit to specify the new channel.

2. A staff engineering study indicates that the allotment of Channel 230C1 to Kailua-Kona, operating at the site proposed by petitioner to relocate its Class A transmitter (BMPH 870519IA), meets the spacing requirements of Section 73.207 of the Rules.[1]

3. In accordance with our established policy, we shall propose to modify the permit for Station KLUA(FM), Kailua-Kona, Hawaii, to specify operation on Channel 230C1. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, the modification can be implemented without demonstrating the availability of an additional equivalent channel for use by other interested parties. *See Report and Order*, MM Docket 85-313, 51 FR 20290, June 4, 1986.

4. Accordingly, in order to provide Kailua-Kona with an opportunity to receive its first wide coverage area FM station, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to that community as follows:

	Channel No.	
City	Present	Proposed
Kailua-Kona, Hawaii	228A	230C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 26, 1988,** and reply comments on or before **June 10, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerome A. Silber
Fly, Shuebruk, Gaguine,
Boros and Braun
45 Rockefellar Plaza
New York, New York 10111
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates for Channel 230C1 at the proposed site are 19,43,15 and 155,55,16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-126

In the Matter of

Amendment of Section 73.202(b), RM-6142
Table of Allotments,
FM Broadcast Stations.
(Philpot, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 4, 1988; Released: April 5, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers a petition for rule making filed by Ted H. Johnson (petitioner), seeking to allot Channel 264A to Philpot, Kentucky, as its first local FM service. Petitioner stated his intention to apply for use of the channel.

2. We believe that the proposal warrants consideration. The allotment can be made in compliance with the minimum distance separation requirements with a site restriction 6.4 kilometers (4 miles) north of the city to avoid short spacing to Station KBVR(FM), Russellville, Kentucky.[1] Accordingly, the Commission seeks comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Rules with regard to Philpot, as follows:

	Channel No.	
City	Present	Proposed
Philpot, Kentucky	---	264A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **May 26, 1988,** and reply comments on or before **June 10, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ted H. Johnson
210 Belle Lake Drive
Nashville, Tennessee 37221
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments. Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates for Channel 264A at Philpot at the restricted site are 37,47,21 and 86,59,02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-127

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Lebanon, Tennessee) — RM-5824

NOTICE OF PROPOSED RULE MAKING

Adopted: March 4, 1988; **Released: April 5, 1988**

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by William O. Barry (petitioner), seeking the allocation of Channel 255A to Lebanon, Tennessee, as that community's second local FM service.[1] Petitioner states that if the allotment is made he will apply for it.

2. Channel 255A can be allocated to Lebanon in compliance with the Commission's minimum spacing requirements with a site restriction of 9.6 kilometers (6.0 miles) north of the city.[2] The restriction is necessary in order to avoid a short spacing to Station WAHR(FM), Channel 256C, Huntsville, Alabama.

3. In view of the fact that Lebanon could receive a second FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lebanon, Tennessee	298A	255A, 298A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 26, 1988,** and reply comments on or before **June 10, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John L. Tierney, Esquire
Ann Bavender, Esquire
Tierney & Swift
1200 Eighteenth Street, N.W.
Suite 210
Washington, D. C. 20036
(Counsels for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner initially sought on reconsideration the allotment of Channel 234A for Lebanon in the Cookeville, Tennessee, proceeding. Action taken by the Commission recently denied the petitioner's request. This petition was held in abeyance pending the Commission's decision. *See* Memorandum Opinion and Order, in MM Docket No. 84-14, adopted January 27, 1988.

[2] The site coordinates are 36-17-28 and 86-16-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-128

In the Matter of

Amendment of Section 73.202(b), RM-6168
Table of Allotments,
FM Broadcast Stations.
(Bastrop, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 3, 1988; Released: April 5, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Hagan Broadcasting, Inc. (petitioner), licensee of Station KMYQ-FM, Channel 261A, Bastrop, Louisiana, the Commission considers herein a proposal to substitute Class C2 Channel 261 for Channel 261A at Bastrop and to modify the station license to specify operation on the higher class co-channel. Petitioner submitted information in support of the proposal and states that its purpose is to improve overall spectrum efficiency by increasing its station's service area. considers herein a petition for rule making seeking the substitution of

2. The channel substitution can be made consistent with the Commission's minimum distance separation requirements with a site restriction of 10.4 kilometers (6.5 miles) south of Bastrop.[1] This site restriction is necessary in order to avoid short spacing to a pending proposal for Channel 260A at Monticello, Arkansas (MM Docket No. 87-184). Petitioner acknowledges the need to relocate its current transmitter site.

3. As requested, we shall propose to modify the license of Station KMYQ-FM to specify operation on the higher class co-channel, Channel 261C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Bastrop.

4. We believe the public interest would be served by proposing the substitution at Bastrop, since it could provide that community with its second wide coverage area FM service.[2] Accordingly, the Commission proposes to amende the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to the following community:

	Channel No.	
City	Present	Proposed
Bastrop, Louisiana	232A, 261A, 277A	230C2, 261C2, 277A

5. The Commission's authority to institute rule making proceedings. showings required, cut-off procedures. and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 26, 1988,** and reply comments on or before **June 10, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James J. Popham, Esquire
Hardy, Popham & Wirpel
700 Camp Street
New Orleans, LA 7013036-2768
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for the proposed site are 32-41-28 and 91-56-55.

[2] In a separate proceeding we have proposed to substitute Channel 230C2 for 232A at Bastrop, as that community's first wide coverage area station. *See* MM Docket No. 87-242, 2 FCC Rcd 4231 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-129

In the Matter of

Amendment of Section 73.202(b), RM-6199
Table of Allotments,
FM Broadcast Stations.
(Bridgeport, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 4, 1988; Released: April 5, 1988

By the Deputy Chief, Policy and Rules Divsion:

1. The Commission has before it the petition for rule making filed by Programmed Communications, Inc. (petitioner) requesting the allocation of Channel 258A to Bridgeport, New York, as the community's first local FM service. Petitioner states that it will apply for the channel, if allocated.

2. Channel 258A can be allocated to Bridgeport in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.0 kilometers (1.9 miles) east to avoid a short-spacing to Station WOKW, Channel 260B, Cortland, New York.[1] Canadian concurrence in the allotment is required since Bridgeport is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allocation of Channel 258A to Bridgeport since an interest in providing the community with its first local service has been expressed. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bridgeport, New York	--	258A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 26, 1988,** and reply comments on or before **June 10, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mr. Timothy Kuhl
President, Programmed Communications, Inc.
101 Cottage Grove Drive
Minoa, New York 13116

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See* Certification *That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Bridgeport are: North Latitude 43o, 09', 22"; West Longitude 75o, 55', 58".

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 28, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR VOICE MESSAGE SERVICE

On March 18, 1988, BellSouth's operating companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed a Comparably Efficient Interconnection (CEI) plan to provide voice messaging services on an unseparated basis. According to BellSouth, its voice messaging services will use voice store and forward equipment collocated with basic network facilities to provide such features as voice message storage, review, reply, retrieval, redirection, broadcasting, scanning, and deletion.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve BellSouth's CEI plan before BellSouth can begin implementing it. BellSouth states that this CEI plan reflects the same approach to the unseparated offering of enhanced services that it described in its Open Network Architecture (ONA) Plan, filed with the Commission on February 1, 1988 and amended on March 10, 1988, but differs from that plan in the way it proposes to minimize transport costs for other enhanced service providers (ESPs).

BellSouth states that it will account for the joint and common costs of the voice message services pursuant to its Part 32 cost allocation manual that the Commission conditionally approved (3 FCC Rcd 128 (1988)) pursuant to the *Joint Cost Order* (2 FCC Rcd 1298 (1987)). BellSouth also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on this plan by *April 25, 1988*, and reply comments by *May 16, 1988*, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. Copies of BellSouth's CEI plan can be obtained from ITS, (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 6, 1988

SOUTHWESTERN BELL SEEKS WAIVER TO ALLOW AMORTIZATION OF DEBT REFINANCING EXPENSES AND UNAMORTIZED DISCOUNTS AND PREMIUMS ASSOCIATED WITH REACQUIRED DEBT
Pleading Cycle Established

On March 1, 1988, in anticipation of the sale of debt securities to fund the call of outstanding debentures, Southwestern Bell Telephone Company (Southwestern) filed a Petition for Waiver of Section 32.4240 of the Commission's Rules. Instead of recognizing an expected loss on the reacquired debt at the time of reacquisition as required by Section 32.4240, Southwestern seeks a waiver to permit amortization of the debt refinancing expenses and the unamortized discount and expense associated with the reacquired debt issue, either over the life of any replacement long-term debt issue, or over the remaining life of the reacquired debt issue. Southwestern states that if it is not allowed to amortize these costs, its investors would suffer a substantial loss, and the refinancing transaction could only be viewed as unacceptable. Southwestern states that its proposed refinancing of debt is in the best interest of ratepayers.

Parties wishing to comment on Southwestern's request should do so no later than May 2, 1988. Reply comments should be filed no later than May 12, 1988.

Parties are requested to serve copies of the comments upon International Transcription Services, Inc. at their offices in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and upon Kenneth P. Moran, Chief, Accounting and Audits Division, Room 812, 2000 L Street, N.W., Washington, D.C. 20554. Parties should refer to File No. AAD 8-1919.

Copies of the petition and related documents may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. The documents are also available for public inspection and copying in Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Debra A. Weber at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 6, 1988

ADDITIONAL PLEADING CYCLE ESTABLISHED ON NECA SUPPLEMENTAL COMMENTS IN CC DOCKET NO. 87 - 2 RELATING TO NECA ADMINISTRATIVE EXPENSES

A Notice of Proposed Rule Making in CC Docket No. 87-2, the Commission's proceeding considering issues relating to the recovery of the administrative expenses of the National Exchange Carrier Association, Inc. (NECA), was released on January 16, 1987. The pleading cycle in that docket was completed on April 22, 1987. After the close of the pleading cycle, the Commission adopted several orders that modify the pooling arrangements and affect NECA's activities. On March 17, 1988, NECA filed Supplemental Comments in CC Docket No. 87-2 which state that the changes prescribed in these Commission orders should be reflected in the methodologies that allocate NECA's administrative expenses. NECA's supplemental comments suggest an alternative approach that would address those changes that have occurred, and that will occur, in NECA functions in the revised regulatory framework.

NECA proposes that its expenses be classified as "Category I" (regulated interstate access activities) or "Category II" (other activities that are authorized but not mandated). Category I expenses would be further divided into three components: universal service fund/Lifeline, common line/exchange carrier support funds, and other NECA tariffs. The disaggregated Category I expenses would be recovered on the basis of the revenues associated with each of these activities.

Interested persons may file additional comments on the issues addressed in the NECA supplemental comments by *April 29*, and reply comments by *May 13, 1988*. Copies of the pleadings in CC Docket No. 87-2 and the NECA supplemental comments can be obtained from International Transcription Services Inc. (ITS), Suite 140, 2100 M Street, N.W., Washington, D.C. 20037, or by contacting Grace Williams, Room 544, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Interested parties should file comments on this request with the Secretary, FCC, 1919 M Street, N.W. Washington, D.C. 20554, and with ITS. Two copies should also be sent to Peggy Reitzel, Policy and Program Planning Division, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W. Washington, D.C. 20554.

For further information, contact Diane Cornell, at (202) 632-9342, or Kent Nilsson, at (202) 632-6363, in the Policy and Program Planning Division of the Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

DAYTONA BEACH COMMUNITY COLLEGE
Channels B1, B2, B3 and B4
Deland, Florida — File No. BPIF-840522DB

HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.
Channels B1, B2, B3 and B4
Orlando, Florida — File No. BPIF-840313DC

For License in the Instructional Television Fixed Service (ITFS)

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 1988; Released: April 6, 1988

By the Commission:

1. The Commission has before it for consideration: (a) letter of October 7, 1986, by the Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, granting the above-captioned application of Daytona Beach Community College (DBCC) and dismissing the above-captioned mutually exclusive application of the Hispanic Information and Telecommunications Network, Inc. (HITN); (b) letter of April 28, 1987, by the Chief, Video Services Division, denying a petition for reconsideration of this action, filed by HITN; (c) Application for Review of this matter, filed May 28, 1987, by HITN; and (d) related pleadings.

2. DBCC is a state-accredited community college that filed applications for ITFS facilities in Daytona Beach (D1-D4), Deland (B1-B4), New Smyrna Beach (G1-G4), and Flagler Beach (B1-B4), Florida. The Daytona Beach station was designed to serve primarily as the original transmitting facility and the other stations as relays[1] for the primary purpose of providing four channels of programming from the Daytona Beach station to distant receive sites. HITN is a nonprofit organization headquartered in New York City that did not amend its Orlando application during the time period required for an ITFS nonlocal applicant to qualify as a local applicant so as to be eligible for comparative consideration with other local applicants. *Memorandum Opinion and Order* in MM Docket No. 83-523 *(ITFS Reconsideration)*, 59 RR2d 1355, 1363-67 (1986). Because HITN's application was mutually exclusive with DBCC's Deland application and HITN's Orlando application was not amended, HITN's Orlando application was dismissed.

3. The action of the staff of the Mass Media Bureau has been reviewed, and we conclude that the matters raised were properly decided in accordance with the rules and applicable Commission policy and precedent. The issues currently before the Commission do not, for the most part, warrant extended discussion. The staff correctly found that HITN's Orlando application was not eligible for consideration with DBCC's Deland application. HITN reiterates matters concerning its eligibility for consideration with a local applicant which we have previously considered in the Rule Making context and any additional arguments presented do not materially affect that determination. *See ITFS Reconsideration* at 1358-63. We also affirm the staff's findings that proper public notice of the pendancy of DBCC's Deland application was available to HITN in accordance with the applicable notice provisions then in effect. Finally, we believe that the staff correctly concluded that the rule limiting a single licensee to four channels in an area is inapplicable to the facts of this case and that the use of the ITFS stations, as proposed, is appropriate. We believe, however, that some further discussion concerning the four-channel limit is warranted.

4. HITN contends that the grant of the application for the Deland station was improper because it contravened the four-channel limitation rule and no consideration was given by the staff to a waiver of that rule. 47 C.F.R. §74.902(d). The rule provides that "a licensee is limited to the assignment of no more than four channels for use in a single area of operation . . . ."[2] HITN maintains that the geographical area covered by DBCC's proposed four-station system constitutes a single area for purposes of the rule, since "area of operation" is defined in Section 74.902(d) as "the area in which the use of channels by one licensee precludes their use by other licensees." Here, the antenna patterns and proposed receive sites of the Deland and Daytona Beach stations produce overlapping areas of preclusion in limited areas in and around Daytona Beach and Deland. However, as explained below, we find that the four-channel rule is inapposite in situations such as the one under consideration where the overlap occurs between an originating and relay station transmitting only four discrete channels of programming.

5. A limit was placed on the number of channels available to a single licensee in a particular area of operation based on what was considered to be sufficient channel capacity to meet the programming needs of most licensees. *Report and Order* in Docket No. 16453, 7 RR2d 1768 (1966). The rule was never intended, however, to preclude the establishment of relay stations that are not designed to serve the same area and are, in fact, located in separate and distinct communities considerable distances apart,[3] and which are necessary to retransmit the same programming from a central origination point to different receive sites in adjacent areas which practically could not otherwise be served. Indeed, if the rule were interpreted as HITN suggests, it would not be possible to effectively provide ITFS coverage to receive sites in an area as large as that encompassed here by Flagler and Volusia counties.

6. Relay stations are explicitly authorized by Section 74.931(d) of the Rules and the showing required for the grant of an ITFS relay is at odds with the showing required for a waiver of the four-channel limitation rule. In considering requests for waivers of the four-channel limitation rule, a licensee must demonstrate that additional channels are needed for the simultaneous carriage of different programming largely within the same geographic

receive site area. *Report and Order* in MM Docket No. 83-523, 98 FCC2d 925, 932-33(1984); *Second Report and Order* in MM Docket No. 83-523, 101 FCC2d 49, 76-78(1985). On the other hand, relay channels are not authorized to augment programming capacity, but rather to be used as part of an integrated ITFS system, retransmitting existing programming to adjacent areas that otherwise would not be served. Consequently, the applicant for a relay station need only show, consistent with the public interest, that additional channels will be used to provide the same programming to distant receive sites. In the instant case, DBCC is using its stations primarily to transmit the same programming to receive sites in discrete areas located proximate to its campuses at Daytona Beach, Deland, Flagler Beach and New Smyrna Beach.[4]

7. HITN also argues that the relay stations proposed by DBCC do not constitute appropriate uses of ITFS facilities. First, HITN contends that the proposed relay stations in Volusia and Flagler counties are precluded by a 1963 order which restricts the use of ITFS stations in certain situations. *See Report and Order* in Docket No. 14744, 39 FCC 846, 853 (1963). In fact, however, the order specifically contemplated relay stations between adjacent or nearby facilities. The limitation on the use of ITFS stations for relaying educational materials between two or more facilities applies to situations where they would be used only as multi-hop links between transmitters rather than being used to retransmit signals as proposed here. Here, DBCC proposes an integrated ITFS system in which the Daytona Beach station would be used primarily as an originating facility and the other stations would not be mere links, but would be used to retransmit the programming of the originating station to receive sites proximate to the relaying facility. Therefore, DBCC's proposed relay stations are not precluded by the restriction imposed by the 1963 order. The proposed use of relay stations by DBCC is the primary use for which such stations are routinely authorized.

8. Second, HITN contends that the proposed relay stations constitute an inefficient use of ITFS facilities. No basis has been provided, however, for altering the staff's conclusion that all four stations are appropriate for the implementation of DBCC's system. As the staff indicated in the reconsideration of its initial action, the design of an ITFS system can involve a number of considerations, including the applicant's current and future needs. The Deland application was processed with full knowledge that it was to be used as one of several stations to relay programming originating at the college's main campus in Daytona Beach. Here, no deficiencies in the proposal were found which would have warranted unfavorable action, nor does HITN attempt to present any convincing documention to support its contention that the grant constitutes an inefficient use of the channels. Indeed, the DBCC facility as a whole appears to be the very type of facility that the ITFS rules were intended to make possible.

9. In view of the foregoing, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, HITN's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] The Deland application was granted on October 7, 1986, the Daytona Beach application on November 6, 1986, and the Flagler Beach application on November 14, 1986. The New Smyrna Beach application remains pending. The Deland relay involved does not serve as a single-path microwave link. Instead, it serves as a second ITFS station that receives the originating signal off the air and retransmits it to additional receive sites farther from the parent's transmitter. There is typically, in these circumstances, an area between the two transmitters where service could be received from both stations.

[2] DBCC is seeking to acquire ITFS facilities in four communities that will utilize a total of sixteen channels with frequency reuse permitting this to be accomplished with twelve discrete frequency channels. The staff first reached for processing the Deland proposal. At that time, therefore, DBCC had no other granted authorizations and, technically, grant of the Deland station would not have exceeded the four-channel limit even if that limit had been found applicable.

[3] The Deland, Flagler Beach and New Smyrna Beach relay stations are 17.2, 26.1 and 13.7 miles, respectively, from the transmitter site of the originating Daytona Beach station.

[4] HITN notes that the DBCC Board of Trustees only authorized four channels for programming purposes. This is entirely consistent with the finding that DBCC does not intend to use more than four distinct programming channels simultaneously (identical program schedules were submitted for all of the stations in the proposed ITFS system) and that the additional channels of the relay stations are intended primarily for retransmitting signals to distant receive sites, even though some program origination may occasionally occur from the relay site.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Adopted: March 14, 1988; Released: April 7, 1988

Greater Portland Broadcasting Corporation
c/o Andrew J. Siegel, Esquire
Suite 1759
45 Rockefeller Plaza
New York, New York 10111-0151

Re: Station KPDX(TV)
Vancouver, WA

Gentlemen:

Greater Portland Broadcasting Corp. (Portland) is the permittee of unbuilt station KTDZ-TV, channel 24, Portland, Oregon, and Columbia River Television, Inc. (Columbia) is the licensee of station KPDX(TV), channel 29, Vancouver, Washington. On December 15, 1986, the Chief, Video Services Division, denied the request of Portland to institute an early renewal proceeding against Columbia. On January 29, 1987, Portland filed a petition for reconsideration of the staff action. On our own motion we will treat this petition as an application for review. *See* Section 1.115 of the Rules.

The facts of this case, which are fully set out in the staff's letter of December 15, 1986, can be briefly summarized. The construction permit for KPDX was granted on January 5, 1981, and shortly thereafter, Columbia sought approval from county officials to construct a tower. Prior to the approval of its application, a county ordinance was passed which required that all future television transmission towers over 200 feet in height have sufficient capacity to be shared by at least three high-power television stations. The ordinance specifically prohibited candelabras, and stipulated that new towers could not be approved unless the applicant demonstrated that no existing or planned tower could accommodate its proposed antenna. In July, 1983, Columbia obtained a zoning permit to build its tower with the condition that the tower have capacity for three high-power television antennas and that Columbia offer space on its tower to noncommercial educational station KOAP-TV, channel 10, Portland, Oregon. Columbia's application specified that KPDX would occupy the highest position on the tower. Potential lessees, including Portland, which had been granted a construction permit on September 17, 1982, were contacted by Columbia during 1983 regarding its proposed negotiation procedures and the order in which it would negotiate. Since no agreement was reached to put KTDZ's antenna on Columbia's tower, Portland filed an application with the county requesting a permit to build its own tower, which was granted in November, 1983. Columbia, through several appeals, unsuccessfully sought to have this decision reversed. Then, Portland filed a petition to institute an early renewal proceeding against Columbia. Portland alleged that Columbia's action in allocating space on the KPDX tower, and in seeking review of the grant of local authority to build a tower for KTDZ established a pattern of continuing anticompetitive conduct aimed at keeping KTDZ off the air.

Based upon the information before it, the staff concluded that: (1) Columbia's allocation of spaces on its tower had not violated any Commission rule or policy; (2) Portland had failed to establish that Columbia's actions seeking reversal of its local authority to build a tower were improper; (3) in the absence of a judicial finding of anticompetitive conduct, the Commission will not attempt to make a determination as to whether Columbia's selection of positions on its tower constituted anticompetitive practice; and (4) Portland had not submitted any compelling reasons or factual evidence which would justify requiring KPDX to file an application for renewal of license in advance of the date required by our Rules.

In the subject petition, Portland argues that Columbia's actions are cognizable under existing Commission policies and that the Bureau erred in finding that Columbia had violated no Commission rule or policy. It alleges that Columbia has violated a core precept behind the Communications Act and Commission rules and policies (i.e., increasing the number of media outlets) in that it sought to eliminate or delay initiation of a new broadcast voice. Moreover, Portland maintains that while the Commission does not dictate antenna allocations, it does get involved in antenna issues where a unique site is involved. *See , e. g.*, BALCT-810127KG and *WTCN Television, Inc.*, 14 FCC 2d 870, 14 RR 2d 485 (Rev. Bd. 1968), *recon. den.*, 17 FCC 2d 909, 16 RR 2d 137 (Rev. Bd. 1968), *modified sub nom. United Television, Inc.*, 38 FCC 2d 655 (1972). Portland claims that the Bureau applied an unduly restrictive reading of the Commission's ruling in *Character Qualification in Broadcast Licensing*, 102 FCC 2d 1179 (1985), *recon. denied*, 1 FCC Rcd. 421 (1986), *appeal docketed sub nom., National Association for Better Broadcasting v. F. C. C.*, No. 86-1179 (D.C. Cir., March 17, 1986), (hereinafter *Policy Statement)* and mischaracterized Columbia's conduct. It believes that the activities of Columbia are FCC-related conduct within the guidelines of the *Policy Statement*. Portland alleges that Columbia has engaged in station-related anticompetitive conduct that has negatively affected the marketplace, and that Columbia has harassed its competitor. Portland argues that even if Columbia's actions were non-FCC misconduct, they still require a license renewal hearing since its delaying of a new service necessarily "shocks the conscience." Further, it argues that the Bureau applied an incorrect standard in assessing its allegations against Columbia by requiring it to establish its case at the pleading stage.

In opposition, Columbia argues that no grounds exist for Portland's petition and that Columbia's actions to lease space on its tower were proper. Columbia states that it appealed Portland's local authority to build another tower because it was compelled by the County to spend a considerable amount of its funds for a joint use tower which the county then refused to require other parties to use. Columbia maintains that because the Land Use Board of Appeals of the State of Oregon found merit in its suit, it cannot be accused of commencing frivolous litigation.

In reply, Portland claims that its petition correctly sets forth the standard determinative of whether KPDX's license should be called up for renewal and that it had demonstrated that a question of fact exists as to the propriety of Columbia's action in forestalling KTDZ's access to the air. Citing *Transferability of Broadcast Licenses*, 53

RR 2d 126 (1983). Portland argues that the Commission need only have "serious" and not "compelling reasons" to advance the renewal date for a licensee which may have engaged in misconduct. In *WTCN, supra*, Portland states that the Commission's primary concern in deferring renewals was a "fair and equitable" allocation of antennas on a tower, rather than anticompetitive concerns. It alleges that Columbia had not allocated space on the KPDX tower fairly.

We have carefully reviewed the above pleadings and we conclude that Portland has submitted no new information or demonstrated any errors which require the reversal of the staff's earlier decision. We reject Portland's arguments that the staff erred in finding that Columbia had violated no Commission rule or policy, and that the staff applied an incorrect standard in assessing its petition by requiring it to establish its case at the pleading stage. In that connection, the Commission has never specifically set out pleading requirements for persons requesting the early filing of renewal applications, except to state that it would grant such a request only for "serious" or "compelling reasons." *See , e. g., Sioux Empire Broadcasting Co.*, 9 FCC2d 683, 684 (1967). Thus, we believe it would be helpful to review the standard of pleadings used in other contexts. Section 309(d) of the Act imposes specific pleading requirements on parties filing formal petitions to deny under that section of the Act. That is, petitioner must allege a substantial and material question of fact, based on matters the Commission can officially note or upon affidavits from persons with personal knowledge, that, if true, would be *prima facie* inconsistent with the public interest. The Commission has similarly imposed a high burden of pleading on parties requesting the Commission to initiate revocation proceedings under section 312(a) of the Act. *See , e. g., Screen Gems, Inc.*, 46 FCC2d 252, 258 (1974). We perceive no reason why persons seeking the early filing of a renewal application, which is not a statutory right, should be held to any lower standard. We conclude, therefore, that persons seeking the extraordinary, discretionary action of calling for the early filing of a renewal application because of alleged "compelling reasons" should, at a minimum, support their requests with factual allegations meeting the requirements of Section 309(d). *See Leflore Broadcasting Co., Inc.*, 36 FCC2d 101 (1972). For the reasons that follow, we believe that Portland has failed to meet this requirement. There is no substantial and material question of fact raising either "compelling" or "serious" reasons making an early renewal application essential.

We reject Portland's argument that Columbia's actions collectively have violated a "core precept" underlining the Communications Act and Commission rules and policies (i.e., increasing the number of media outlets). Columbia has explained the reasons for its assignment of space on its tower, and we find its explanation plausible. It is reasonable for the owner/landlord to act to meet a condition to which the tower construction is subject before it allows anyone else on its tower. Because Columbia was required by the local zoning authorities to accommodate the educational station's antenna, it is logical to expect it to seek to satisfy the condition at the outset. Moreover, we think that it is perfectly reasonable for an owner/landlord to select for itself the best position on its tower and we know of no rule or precedent that requires the owner/landlord to yield the preferred position to a competitor. Further, we do not view Columbia's efforts fully to utilize the tower it was required by local authorities to construct as being motivated by a desire to stifle effective competition. While Portland objects to these actions, it has profferred no specific factual information evidencing that space on Columbia's tower was not allocated on a fair and equitable basis.

Portland's reliance on *WTCN, supra*, is misplaced. The issue before the Commission there was the question of whether VHF television station licensees who were authorized to construct tall towers on an "antenna farm" should be compelled to make provisions to accommodate the antennas of present and future UHF stations. The question was one of whether or not space would be provided and upon which tower. Portland does not contend that Columbia refuses to allow it to mount its antenna on KPDX's tower. The issue here is simply whether Portland's dissatisfaction with the available position on the tower, based on its private business conclusions, should entitle it to dictate to the owner/landowner the placement of the tenants' antennas. We think that it does not. Portland characterizes Columbia's actions as blocking KTDZ's access to broadcasting, but the facts clearly show that Portland is not now on the tower because of its own discontent with the available space and not because Columbia has denied it space. The Commission plainly cannot become involved in the good faith negotiations of a landlord and tenant over what space the tenant will occupy on the tower.

Portland alleges that Columbia's participation in local zoning proceedings involving its permit to build a tower was intended primarily to cause delay of its construction of KTDZ. We disagree. Because of local zoning laws, Columbia was required to expend a considerable amount of money to construct a tower that could accommodate three high-power television antennas. The local zoning ordinance specifically stated that new towers could not be approved unless no existing or planned tower could accommodate the proposed antenna. Columbia has explained that it appealed the local zoning board's decision to grant Portland a permit to build a tower because the board had failed to enforce a county ordinance. As stated in the staff letter, the Commission cannot adopt policies that discourage licensees from pursuing remedies that may be available to them under pertinent laws, including zoning laws.

Although not specifically stated, Portland may be alleging that the pleadings filed by Columbia were in the nature of a strike petition. The Commission has firmly stated that the crucial consideration in determining whether any pleading is in the nature of a strike petition is whether it was filed for the primary purpose of delay. *Radio Carrollton*, 69 FCC 2d 1139 (1978) *recon. denied*, 72 FCC 2d 264 (1979). In making such a determination, the Commission considers a number of factors, including the absence of any reasonable basis for the allegations raised in the pleadings. For the reasons set out above, we find that Portland has failed to establish that Columbia's actions lacked a reasonable basis. Further, Portland has not provided any evidence establishing that Columbia's sole purpose was to delay construction of KTDZ. We will not infer the existence of a primary purpose to delay from the mere filing of pleadings that a licensee has a statutory right to file.

Upon review of the information now before us, we find that the allegations in Portland's pleadings fail to raised any substantial and material questions regarding Colum-

bia's conduct. Accordingly, we see no reasons to invoke our discretionary authority under Section 73.3539(c) of the rules which provides that "whenever the FCC regards an application for renewal of license as essential to the proper conduct of a hearing or investigation and specifically directs that it be filed by a date certain, such application shall be filed within the time thus specified."

Accordingly, IT IS ORDERED, That the petition for reconsideration filed on behalf of Greater Portland Broadcasting Corp. IS DISMISSED; when considered as an application for review, IS DENIED.

BY DIRECTION OF THE COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Adopted: March 14, 1988; Released: April 6, 1988

Sam Parker, d/b/a
WML LPTV Company
1500 Diuguid Road
Murray, Kentucky 42071

Dear Mr. Parker:

This refers to your application (BPCT-850315KG) for a new commercial television station to operate on Channel 38 in Murray, Kentucky. Commission records indicate that you are an officer, director and 50 percent stockholder of Jackson Purchase Broadcast Co., licensee of station WSJP(AM), Murray, Kentucky. In view of your proposed ownership of colocated radio and television stations, you have requested a grant pursuant to the Note 4 to Section 73.3555 of the Commission's Rules.

Section 73.3555(b) of the Commission's Rules, generally proscribes the grant of a television construction permit to anyone who directly or indirectly owns, operates, or controls an aural broadcast station licensed to the same community as the proposed television station. Note 4 to the Rule, however, provides that applications for UHF television facilities "will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest."

In support of your request, you estimate that by utilizing available used equipment, it would cost approximately $806,000 to construct the television station. You further claim that joint operation of the proposed television station with WSJP(AM), by using the services and personnel of the radio station, will save approximately $168,760 annually (about 20 percent) of the projected costs of operating the television station during its first years on the air.

Murray, located in Calloway County, Kentucky, has a population of 14,248, while the County has a population of 31,031 (1980 Census) and it is served by two AM stations, including WSJP(AM), a noncommercial educational television station, and two FM stations (one of which is noncommercial educational). You state that Murray receives "listenable" signals from 5 other AM stations and 7 other FM stations licensed to distant communities.

Calloway County, in which Murray is located, is included in the Cape Girardeau, Missouri, Harrisburg-Marion, Illinois television market, which is ranked as the 75th largest market, according to Arbitron's 1985-86 rankings. You assert that Murray receives some off-the-air (but not Grade B) service from television stations KBSI, Channel 23 (Ind.) and KFVS-TV, Channel 12 (CBS), Cape Girardeau, Missouri; WSIL-TV, Channel 3 (ABC), Harrisburg, Illinois; WBBJ-TV, Channel 7 (ABC), Jackson, Tennessee; WDCN, Channel 8 (noncommercial educational), WKRN-TV, Channel 2 (ABC), WSMV, Channel 4 (NBC), WTVF, Channel 5 (CBS), and WZTV, Channel 17 (Ind.), Nashville, Tennessee.[1] WPSD-TV, Channel 6 (NBC), Paducah, Kentucky, provides the sole Grade B service. Moreover, based on information recently released by the Murray Cablevision System, you claim that there are 5,200 subscribers (about 69 percent) in Murray, out of a total of 7,500 households that could subscribe if they so elected. In view of the foregoing, you contend that no undue concentration of the media will result from a grant of this application. Additionally, you have proposed a number of locally originated programs.

Based upon the above representations, we conclude, under the circumstances of this case, that permitting the radio/UHF television combination would be consistent with the public interest and past precedent. The Commission has allowed the establishment of radio/UHF television combinations where the support supplied by the radio station was essential to the development or viability of the television stations. *See , e. g., Best Broadcasting Co., Inc.*, 54 RR 2d 1471 (1983); *WFIL, Inc.*, 1 FCC Rcd 290 (1986). You have demonstrated that Murray is a small community in a rural area that is unlikely to sustain the operation of an independent UHF television station. It appears the development of a UHF television station in Murray will likely be dependent upon the substantial savings from joint operation of the radio and television facilities. *See TV 8, Inc.*, 91 FCC 2d 1012 (Rev. Bd., 1982), *review denied*, FCC 83-238, released August 29, 1983; and *Combined Communications Corp.*, 28 FCC 2d 16 (1970). Further, grant of the application would foster the development of UHF television in Murray, bringing the community its first local commercial television station. Moreover, in view of the other broadcast services available in the area and the significant cable television penetration, no undue concentration of the media will result from permitting the television station to be owned and operated in combination with WSJP(AM). Therefore, having found the applicant fully qualified and that the public interest, convenience and necessity would be served, your application for authority to construct a new commercial television on Channel 38 in Murray, Kentucky, IS GRANTED.

BY DIRECTION OF THE COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTE

[1] According to the *Television & Cable Factbook*, 1987 edition, these stations have net weekly circulation in Calloway County as follows:

KBSI, Cape Girardeau, between 5% and 24%

KFVS, Cape Girardeau, 50% or over

WSIL-TV, Harrisburg, between 25% and 49%

WBBJ-TV, Jackson, between 25% and 49%

WDCN (noncommercial ed.), Nashville, not available

WKRN-TV, Nashville, between 25% and 49%

WSMV, Nashville, between 25% and 49%

WTVF, Nashville, between 25% and 49%

WZTV, Nashville, between 5% and 24%

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-155

In the Matter of

SILVER STAR
COMMUNICATIONS-ALBANY,
INC.

Licensee of Radio Stations WJMJ and
WFAV-FM
Cordele, Georgia

Order to Show Cause Why the Licenses
of WMJM and WFAV-FM, Cordele,
Georgia, should not be revoked

APPEARANCES

Willie J. Nunnery, on behalf of Silver Star Communications-Albany, Inc.; and *Larry A. Miller* and *Jerry M. Hermele*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD LUTON

Issued: March 25, 1988; Released: April 7, 1988

PRELIMINARY STATEMENT

1. By *Order to Show Cause and Notice of Apparent Liability*, FCC 86-172, released April 17, 1986, the Commission designated for hearing the matter of whether the licenses of Radio Stations WMJM and WFAV(FM), Cordele, Georgia, should be revoked. The following issues were specified against the licensee, Silver Star Communications-Albany, Inc. (Silver Star):

(a) To determine whether the principals of Silver Star abused the Commission's distress sale process in connection with the termination of the hearing proceeding and the Commission's related grant of assignment of license applications in MM Docket Nos. 83-47 through 83-49 (File Nos. BAL-831004GS; BAL-831400GT; BALH-831004GU and BALH-831004GV);

(b) To determine whether Silver Star, as applicant in BAL-831004GT and BAL-831004GU, complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial and significant changes as required by Section 1.65 and, if not, the effect of such noncompliance on the Commission's distress sale process;

(c) To determine whether Silver Star, in violation of Section 310(d) of the Communications Act of 1934, as amended, transferred control of Stations WMJM and WFAV-FM without a finding by the Commission that the public interest, convenience and necessity would be served thereby and if so, whether such transfer further constituted an abuse of the Commission's distress sale policy; and

(d) To determine, in light of the evidence adduced under the foregoing issues, whether Dr. John Robert E. Lee and other principals of Silver Star possess the requisite qualifications to be or to remain licensees of the captioned radio stations.

The *Order to Show Cause and Notice of Apparent Liability* also provided that if revocation of the stations' licenses was determined not to be warranted, then it should be determined whether a subsequent Order for Forfeiture in the amount of $20,000 should be issued for Silver Star's alleged violation of Section 310(d) of the Communications Act of 1934, as amended (unauthorized transfer of control). The burden of proceeding with the introduction of evidence and the burden of proof on Issues (a) through (d), above, were placed on the Mass Media Bureau (Bureau).

2. On May 19, 1986, the Bureau served its Bill of Particulars upon Silver Star. Prehearing conferences were held in Washington, D.C., on June 16, 1986, and September 11, 1986.

3. Hearing sessions were held in Cordele, Georgia, on December 8-17, 1986, and in Washington, D.C., on April 27-29, 1987. By *Memorandum Opinion and Order*, FCC 87M-903, released April 24, 1987, the Presiding Judge, upon motion of the Bureau, added the following issues against Silver Star:

(e) To determine whether Silver Star has abused the Commission's processes by failing to respond fully to the Mass Media Bureau's discovery requests and the presiding judge's *Order*, and whether, in light of the evidence adduced, Silver Star has the requisite qualifications to remain a Commission licensee; and

(f) To determine whether Silver Star has abused the Commission's distress sale processes by filing an application to upgrade the facilities of Station WJIZ(FM), Albany, Georgia, in violation of the terms of the Commission's grant of the transfer of Stations WJIZ(FM), WMJM, WFAV(FM), and WTJH to Silver Star in 1984 and without providing information about the existing overlap or justification for the filing and, in light of the evidence adduced, whether Dr. John Robert E. Lee and other principals of Silver Star possess the requisite qualifications to be or remain licensees of WMJM and WFAV(FM).

These issues were tried in Washington during the final hearing session on June 23, 1987; the record was also closed at that time (Tr. 3153). Proposed findings of fact and conclusions of law were submitted by the parties on August 28, 1987, and reply proposed findings were filed on October 9, 1987.

BACKGROUND

4. James S. Rivers founded AM Station WMJM, Cordele, Georgia, in 1940. He and other family members later acquired nine additional radio stations in Georgia and Florida, including WTJH(AM), East Point, Georgia, and WJAZ(AM) and WJAZ(FM), Albany, Georgia (Tr. 667-71). In 1969, Rivers began operating WFAV(FM), Cordele (Tr. 2030-31). The licensee of WMJM and WFAV(AM) (the Cordele stations) was Southeastern Broadcasting System, Inc. (Southeastern), the principal owner of which was James S. Rivers (MMB Ex. 40, p. 2). Rivers had four sons, James Jr., Herschel, Tolliver and Ronald, each of whom held various interests in the family's broadcasting business. James Jr. owns a station at Waycross, Georgia (Tr. 668-69). Herschel, who is deceased, held a minority interest in WTJH and WJIZ(FM). Ronald Rivers held a minority share of the Cordele stations (MMB Ex. 39, pp. 2-3; MMB Ex. 40, pp. 61-64; Tr. 1088-89).[1]

5. By *Memorandum Opinion and Order*, 48 Fed. Reg. 8585, published March 1, 1983, the Commission designated the 1981 license renewal applications of WTJH, WJIZ(FM), and WMJM and WFAV(FM) (the licensees) for a consolidated hearing to determine whether the 1978 WTJH license renewal application contained misrepresentations, and whether WTJH principals misrepresented facts concerning that 1978 application to the Commission during the course of its investigation. On June 16, 1983, the licensees decided to seek a distress sale of the four stations pursuant to the Commission's *Statement of Policy on Minority Ownership of Broadcast Facilities*, 687 FCC 2nd 979 (1978), and the *Clarification of Distress Sale Policy*, 44 RR 2nd 479 (1978).

6. Inquiry was made by several prospective purchasers (Tr. 683-84; MMB Ex. 36, p. 1), among them Mr. Fred (Doc) Suttles, Jr., a long-time employee at WJIZ. Suttles lacked the financial resources to buy the four Rivers stations, but he learned that his old acquaintance, Dr. John Robert E. Lee, was involved in the broadcasting business. Suttles telephoned Lee and told him that the four Rivers stations could be purchased in a distress sale occasioned by the Rivers' legal problems with the FCC. Lee told Suttles that he was interested (Tr. 69, 71, 1607-08). Later, Dr. Lee introduced himself to James Rivers through a telephone call (Tr. 73).

7. Lee, a Black male, received his doctorate in education in 1973 from the University of Kansas (Tr. 491). He worked in the athletic departments at the University of Kansas and the University of Wisconsin and, later, at Tennessee State University, where he was the Director of Athletics (Tr. 64-65). In the late 1970's, Dr. Lee entered the broadcasting field, purchasing an interest in two Texas television stations at Lubbock and Abilene through a distress sale. Later, Lee purchased two Columbus, Georgia, radio stations, an AM/FM radio combination at Jacksonville, Florida, and a portion of WRIF(FM), Detroit, Michigan.

FINDINGS OF FACT

I. *The Secret Agreement Issues*

A.

8. Dr. Lee was primarily interested in purchasing WJIZ. By August 1983, he understood that WTJH and the Cordele stations could be sold soon after they were acquired, since the FCC did not require distress sale purchasers to hold onto their acquisitions for any minimum period of time (Tr. 99-100, 2354-56). Lee intended to sell those stations as quickly as possible

9. Dr. Lee met Mr. James Rivers for the first time in August 1983. It may have been at that meeting that James Rivers, for the first time, made known his desire that Ronald Rivers and Sara Howell be enabled to acquire the Cordele stations at some time in the future (Tr. 81-82). Lee's position was that he "would be willing to sanction whatever the FCC would sanction" (Tr. 86).

10. On October 3, 1983, a Memorandum of Intent was executed by James Rivers on behalf of the sellers, and Dr. Lee on behalf of the buyers. This Memorandum of Intent provided that WJIZ and WTJH were to be purchased for cash, and that the buyers would give a promissory note for the Cordele stations. The following provisions were also included:

> It is also agreed that at Closing, Buyers will give an option to Ronald Rivers and Sara Howell, or a corporation of which they are or will be principals, to acquire the assets of stations WMJM(AM) and WFAV(FM), Cordele, Georgia, free and clear at Closing. The option terms shall be for a period of one (1) year from Closing between Buyers and Sellers and consideration will be assumption by Ms. Howell and Mr. Rivers of the promissory note, plus payment of accrued interest thereon. Appropriate leases and contracts will be assigned to Ms. Howell and Mr. Rivers. It is specifically understood that the final decision on whether to buy the station may be made by Mr. Rivers and/or Ms. Howell at any time until the one (1) year option expires by giving notice in writing at least five (5) working days prior to the expiration of the one (1) year option period to advise Sellers of their intent to exercise the option at the price indicated hereinabove (MMB Exhibit 2).

11. The Rivers filed the Memorandum of Intent along with a motion for relief by way of distress sale of the four radio stations to Silver Star. At a prehearing conference held to discuss the matter on October 6, 1983, the presiding judge in that license renewal proceeding expressed the opinion that "the existence of an option raises questions of the bona fide[s] of the distress sale." More particularly, the judge doubted the propriety a provision which, in his view, would merely allow the stations to be passed through the hands of minority buyers, and then back to non-minority buyers--who also could turn out to have been the "wrongdoers" in the first place (MMB Ex. 32, pp. 68-69). By the time of the second prehearing conference held to discuss the matter on October 13, 1983, counsel for Rivers and counsel for Silver Star informed the judge that their clients had agreed to eliminate the troublesome provisions from the Memorandum of Intent (MMB Ex. 32, pp. 92-105).

12. Ronald Rivers, Sara Howell and Dr. Lee all signed a statement withdrawing the provisions for the giving of an option from the Memorandum of Intent (MMB Ex. 4, p. 3; Tr. 1967-68). Rivers and Howell also signed an affidavit which represented the following:

> Ronald Rivers and Sara Howell . . . have no agreements, understandings, commitments, or similar arrangements, written or oral, whereby they will continue in any employment or other relationship with Silver Star Communications- Albany, Inc., should Silver Star become licensee of any of the stations being acquired by Silver Star from the Rivers family . . . . (MMB Ex. 4, p. 2; Tr. 1115, 1967-68, 2708).

The statement was undated but the affidavit was dated October 27, 1983. Lee also signed an affidavit on November 2, 1983, stating that:

> John Robert E. Lee . . . has made nō agreement, understanding, commitment, or other arrangement written or oral, whereby he has committed to continue any employment or other relationship with Silver Star . . . of Ronald Rivers or Sara Howell should Silver Star . . . become licensee of stations WJIZ-FM, Albany, WTJH, East Point, or WMJM/WFAV, Cordele . . . . (MMB Ex. 4, p. 5; Tr. 161).

Relying on the foregoing representations, the judge in the license renewal proceeding granted the Rivers' motion for a continuance of the hearing (so that distress sale relief could be pursued). *Order*, FCC 83M-4396, released November 29, 1983.

13. Dr. Lee testified that after November 2, 1983, there existed no agreement for him to sell the Cordele stations to Ronald Rivers and Sara Howell (Tr. 154). He also testified that neither before or after October 3, 1983 (the date of the Memorandum of Intent), he was never told by anyone that he could buy WJIZ only if he was willing to sell the Cordele stations to Ronald Rivers (Tr. 139). Lee testified that after November 2, 1983, he had "continued discussions" with the Rivers about selling the Cordele stations to Ronald Rivers but that "No agreements, however, were put in place" (Tr. 185). Lee had a continuing desire "to get rid of Cordele and East Point as quickly as I possibly can in a legitimate, legal manner," and Ronald Rivers would have been an acceptable buyer of the Cordele stations if the FCC would permit that to happen (Tr. 186).

14. Ronald Rivers testified that, between November 1983 and November 1984, he did not believe that he would be able to purchase the Cordele stations from Dr. Lee, and that he talked with no one about the subject (Tr. 1122-23). Finally, Sara Howell testified that she was unaware of any agreement between Dr. Lee and James Rivers after October 1983 whereby Lee would attempt to sell the Cordele stations to her and to Ronald Rivers (Tr. 1978-79).

B.

15. Dr. Charles Finney was the sole owner of WJAZ in Albany in 1983 (Tr. 2208). Fred Finney is Dr. Finney's son. Fred Finney graduated from the University of Georgia Law School in 1982 and, before that, had received a degree in business administration from Emory University (Tr. 1942, 1699).

16. Dr. Lee contacted Dr. Finney in October 1983, and told him that Lee had a contract to purchase WJIZ, Albany, from the Rivers family, and that he wanted to buy a complementing AM station, namely, WJAZ, Albany (Tr. 1645, 2210-12). On November 25, 1983, Dr. Lee agreed to purchase 75% of WJAZ from Finney on two conditions: that Lee acquire WJIZ from the Rivers, and that Finney obtain a long-term lease of the existing WJAZ transmitter site from the Rivers, or, in the alternative, that a new transmitter tower be built (Tr. 223, 1702, 2214-15, 2236).[2] WJAZ was for sale because it was an unprofitable station for Dr. Finney (Tr. 170).

17. In December 1983, Fred Finney drafted a typewritten version of a proposed WJAZ tower site lease (MMB Ex. 17; Tr. 1706). The draft included this provision:

> 16. In the event that _____ and _____ have not received a bona fide offer to sell radio stations _____ and _____ located in Cordele, Georgia, at a price not to exceed _____ Dollars ($) _____ by July 15, 1984, then and only in that event, James S. Rivers, Inc., shall have the right to terminate this agreement upon five (5) days written notice to Lessee (MMB Ex. 17, p. 4).

18. Fred Finney testified that this Paragraph 16 was included in the draft in order to offer the Cordele stations to Ronald Rivers and someone else (perhaps Sara Howell) in exchange for a very favorable lease on the WJAZ tower site (Tr. 1714-15). In addition, Fred Finney testified that he inserted Paragraph 16 as a "bargaining chip," upon Dr. Finney's suggestion and with Dr. Lee's approval (Tr. 1716-18). Lee, however, did not suggest the inclusion of Paragraph 16 (Tr. 1717); that idea originated with Dr. Charles Finney. Lee did not instruct the Finneys to use the so-called "option" provision in Paragraph 16 as a negotiating tool; rather, the Finney's took it upon themselves to include that provision in order to secure the long-term lease desired by Dr. Lee (Tr. 225). Fred Finney gave the typewritten draft to Dr. Finney, who read the entire draft, and then presented it to James Rivers in December 1983 (Tr. 1709, 1712-13, 2218, 2230). Mr. Rivers declined to sign the proposed lease. Subsequently, a counteroffer of $1500 per month rent for the WJAZ tower site and studio was made; Dr. Finney rejected that counteroffer, and there were no further negotiations about the matter.

C.

19. On January 9, 1984, while the Silver Star-Rivers distress sale proposal was still pending, Mr. Douglas M. Sutton, Jr., of Sutton Farm in Ty Ty, Georgia, wrote a letter to Lee indicating an interest in acquiring the Cordele stations from Lee once the sale of those stations from James Rivers had been finalized (MMB Ex. 29, pp. 1-2; Tr. 1414-15, 1440). Sutton got no response to this letter (Tr. 1405). A month or so after his January 9 letter,

Sutton contacted Silver Star stockholder Doc Suttles about the matter. He learned that Lee did receive the January 9 letter, that Silver Star had not decided what it was going to do with the Cordele properties, and that as soon as that matter was decided, Sutton would hear from Silver Star (Tr. 1407-08).

20. The Rivers-Silver Star distress sale proposal was approved by the Commission on May 24, 1984. Specifically, the four Rivers stations' license renewal applications were granted, and the assignment of license applications for those stations were granted conditioned on the transfer of control of all four stations within 90 days (MMB Ex. 63).

21. Sometime prior to August 13, 1984, Suttles contacted Sutton and told him that Silver Star was interested in discussing a possible sale of the Cordele stations, but that the first step would be a letter from Sutton expressing an interest in acquiring the stations. Suttles explained to Sutton that Dr. Lee needed a letter that he could present to his bankers, one mentioning a possible purchase price in the range of a half million dollars. Sutton directed such a letter to Lee under date of August 13, 1984 (Tr. 1408-09; MMB Ex. 29, p. 2). Sutton received no response from Silver Star to his August 1984 letter (Tr. 1411).

22. About 1 year later, Suttles contacted Sutton to ask if Sutton was still interested in purchasing the Cordele stations; Suttles indicated that Silver Star was interested in selling these properties and invited Sutton to make an offer (Tr. 1415-16). Sutton requested certain information about the stations, such as income and expenditures, prior to making any offer, and soon after that request, Suttles provided him with the past year's financial statements and monthly statements of income and expenditures (Tr. 1417). Suttles and Sutton talked two or three more times by telephone with Sutton requesting financial information, most of which he obtained, and then it was time for Mr. Sutton to meet with Dr. Lee to discuss the possible sale of the stations (Tr. 1417-18).

23. In late 1985, Sutton, his partner Jim Hardy, Dr. Lee and Mr. Suttles met at the Ramada Inn in Albany, Georgia, where they had a rather thoroughgoing discussion about the possible purchase of the Cordele stations (Tr. 1418-24). The matter was left on an apparently hopeful note, with each side attempting to assure the other that a deal was indeed possible. A sale price was agreed upon (Tr. 1425).

24. Shortly following this meeting, Sutton began making periodic requests of Suttles for information about the stations, such as the amount of money each advertiser was spending on a monthly basis, the rates advertisers were paying for each commercial that aired, and a breakdown of the AM station's revenue billing versus the FM billing, and a breakdown of the payroll showing the amounts of money that the stations' employees were earning--all of which information was provided to Sutton by Silver Star (Tr. 1424).

25. Thereafter, Sutton received a telephone call from Dr. Lee in which Lee indicated that, a purchase price having been agreed upon, it was time for the parties to have prepared a contract of sale (Tr. 1426). A few days later, Sutton received from Lee a draft of a purchase contract (Tr. 1426). Although price had been agreed upon, there were other details that remained to be worked out. Among those unresolved problems was the matter of a lease of certain real estate, and the assumption of a certain note. The consent of James Rivers was necessary with respect to these matters, and Rivers was not willing to give that consent. By letter of February 17, 1986, Douglas Sutton made what turned out to be his final offer to Lee concerning the proposed purchase of the Cordele stations (MMB Ex. 29, pp. 4-5). Sutton received no response from Silver Star to his February 17, 1986, letter (Tr. 1436).

26. By August 1984, Dr. Finney was quite anxious to sell WJAZ to Silver Star. His agreement with Dr. Lee for the purchase of WJAZ was contingent upon Lee's acquisition of WJIZ. Lee's previously obtained source of financing for WTJH and WJIZ had fallen through by this time. Therefore, Dr. Lee sought Dr. Finney's help in obtaining new financing. Lee agreed to give Dr. Finney a minority ownership share in Silver Star in exchange for Dr. Finney's assistance. Financing was eventually obtained from the First Atlanta Bank. Dr. Finney was aware that James Rivers was financing the purchase of the Cordele stations (Tr. 1702-03, 2237-40; MMB Ex. 8, p. 4).

27. Dr. Finney and Dr. Lee agreed that the Cordele stations and WTJH should be sold as soon as possible after the sale and purchase of all four stations had been closed (Tr. 232-33, 1733-34, 2233, 2240, 2248). Bishop Levi Willis had contacted Dr. Lee in about October 1983 regarding a possible purchase of WTJH (Tr. 221). By the summer of 1984, Dr. Lee viewed Willis as a prospective purchaser, and began negotiations with him (Tr. 256, 2246).

28. In an October 5, 1984, letter sent to Dr. Lee, Dr. Finney wrote:

> We must have a plan for the management of the Cordele property during the time that the FCC will be considering the transfer of that facility back to Mr. Rivers. We also need to be prepared to operate the Atlanta station until we can close with Mr. Willis (MMB Ex. 8, p. 3).

At the time he wrote this letter, Dr. Finney viewed Bishop Willis as "our number one prospect" with respect to WTJH; he viewed Ronald Rivers to be in the same position with respect to the Cordele stations (Tr. 2263-64).

29. According to Fred Finney, the possibility of selling the Cordele stations was discussed among Dr. Lee, Dr. Charles Finney and himself, it having been decided that it was their right to sell to Ronald Rivers if they so desired, "but that we could have no agreement prior to closing and to avoid all conversations prior to closing" (Tr. 1731). Fred Finney testified that prior to closing, there was "no agreement" to sell the Cordele stations to Ronald Rivers (Tr. 1732). Lee testified that prior to closing, he did not make an offer to Ronald Rivers to sell the Cordele stations to him, and that his "intentions were to do whatever my counsel and whatever FCC would deem as permissible within the law" (Tr. 244-46). Prior to closing, Dr. Lee told Dr. Finney that there was "no agreement" with Ronald, but only that Ronald was a "potential purchaser" at that time (Tr. 2249).

D.

30. William Goodson worked as a writer and announcer at WMJM, Cordele, Georgia, in 1958. Eventually, he became the general manager of both of the Cordele stations (Tr. 203031).

31. Goodson became aware of possible program log falsification at WTJH in 1978, in connection with the preparation of that station's renewal application (Tr. 3032). He resigned his positions at the Cordele stations in September 1979 (Tr. 2031). On February 18, 1981, Goodson was attacked by two unknown assailants and severely beaten. Goodson's speculation is that his "attackers were hired by Mr. James S. Rivers and his family" (Tr. 2036). Shortly after the attack, on about March 2 or 3, 1981, Goodson lodged a complaint with the FCC alleging program log falsification in connection with the 1978 WTJH renewal application (Tr. 2078). Goodson waited 3 years, from 1978 to 1981, to make his complaint to the FCC because:

> "I hoped that I would be able to compete in a live and let live situation. As a matter of fact, when I left Mr. Rivers I made that statement, and that was going to be my policy and that I wanted to do that, and despite the fact that Mr. Rivers filed four lawsuits which had no grounds, and that related against me, I still did not report the incident to the FCC. I only reported him after I was attacked and left for dead" (Tr. 2079).

32. Sara Howell began working at the Cordele station as bookkeeper in 1957 (Tr. 1953). In 1972, Mr. James Rivers made a gift to Sara Howell of 30 shares of the 100 shares of Southeastern Broadcasting System, Inc., stock (Tr. 1957-58; MMB Ex. 9, pp. 7-8). According to Mr. Rivers, he made the gift because of his "very warm" and "intimate relationship with Howell (Tr. 779). Sara Howell resigned her employment at the Cordele stations in April 1984 (Tr. 1976). Sometime in 1985, in order to recover her 30% ownership share in Southeastern Broadcasting, Sara Howell sought to have the corporation liquidated (Tr. 1988).

33. Mr. William Goodson had known Sara Howell since the 1960's when they both worked at the Cordele radio stations. Goodson testified that he had not talked to Sara Howell between 1979 and April 1984 (Tr. 2037). In August of that year, Goodson and Howell discussed Howell's possible employment at the cable television station which Goodson owns in Cordele (Tr. 2038) and in October 1984, Howell began work as a bookkeeper and salesperson at the station (Tr. 1955-56, 2037-38).

34. Goodson assisted Sara Howell in the preparation of an employment discrimination complaint against James Rivers (Tr. 2017-20). This complaint was filed with the Equal Employment Opportunity Commission in Atlanta, Georgia, on September 11, 1984. The complaint described alleged sexual harrassment of Howell by James Rivers, and requested the following relief:

> "A. That Southeastern Broadcasting System, Inc., be ordered to pay me a sum of money equal to the full salary that I would have earned from April 13, 1984, up to the date that the stations are actually transferred to a new owner.
>
> "B. That Southeastern Broadcasting System, Inc., be ordered to disburse to me 30% of the sale price of WMJM/WFAV (sale price $400,000--my share $120,000) plus 30% of all interest which Southeastern may receive on the $400,000. Plus, I petition that they be ordered to pay me 14% interest on my $120,000 from the date the station sale is finally closed up to the date on which they disburse to me my legal share, and that they be ordered to disclose to me fully the disposition of the Certificates of Deposit in which I have a rightful 30% share. (MMB Ex. 10).

Goodson also assisted Sara Howell in the preparation of a letter sent to the FCC on September 11, 1984. According to the document, it is a "Petition to Deny Additional Time to Radio Stations WTJH, East Point, Georgia; WMJM & WFAY, Cordele, Georgia; and WJIZ, Albany, Georgia; and Petition to Order a Stipulation in the Distress Sale Contract of WMJM/WFAV to Protect the Interest of Female Stockholder, due to EEOC violations" (MMB Ex. 10).

35. Mr. Goodson had known Mr. Suttles since some time in the 1960's when they both worked at WJIZ. Goodson considered Suttles to be a good friend, and the two of them talked frequently about various matters (Tr. 1623). Dr. Lee and Mr. Goodson had never met one another (Tr. 2083). Nevertheless, according to Goodson, he was told by Suttles that Dr. Lee was going to contact him (Tr. 2041).

36. According to Goodson, the first conversation he had with Dr. Lee occurred on April 12, 1984 (Tr. 2041), when Goodson was telephoned by Dr. Lee, with Suttles also a party to the call, and apparently also in Lee's presence (Tr. 2042). According to Goodson, Lee indicated that Silver Star was close to concluding the purchase of the four radio stations; he had been told by Suttles that Goodson had a technical background, and he was concerned about the quality of the sound at WJIZ. Consequently, Lee asked if Goodson would be willing to take a look at the sound quality problem at WJIZ. Goodson indicated that he would be so willing, and that he would talk with Lee more about the matter after Lee had acquired the station (Tr. 2044). During this conversation, Goodson brought up the subject of the Cordele stations, saying that it, too, had poor sound quality. Then, says Goodson, Lee volunteered to tell Goodson something "very confidential." The confidential information is said by Goodson to have been this: there should be no concern with the Cordele stations or the East Point station since Lee thought he already had a buyer for East Point and, with respect to Cordele, "[Lee] had agreed to give the Cordele stations back to Ron Rivers and Sara Howell as part of the package deal" (Tr. 2046-47). According to Goodson, Lee stated that he had to agree to "give" the Cordele stations back to Ronald Rivers and Sara Howell under threat of Mr. Rivers finding another buyer who would turn those stations back to Ronald Rivers and Sara Howell.

37. Goodson testified that sometime during the last week of April 1984, he again received a telephone call from Lee (and Mr. Suttles) during which the technical matters relating to WJIZ and Cordele were again discussed. Then, in response to Goodson's inquiry about whether Silver Star still planned sell the East Point and Cordele stations, Lee said that, particularity respecting Cordele, he did not really have a lot of choice because "Mr. Rivers had been very persistent that it get back to Ron" (Tr. 2049).

38. According to Goodson, he received another telephone call from Dr. Lee (and Mr. Suttles) on May 25, 1984, and was told by Lee that the FCC on that day had

approved the distress sale (Tr. 2050-51). Again, in response to Goodson's inquiry about whether the earlier expressed plans for East Point and Cordele still held, Lee answered in the affirmative and, says Goodson, Lee stated that "Mr. Rivers had been very persistent that they sell the station back to Ron Rivers and that they were going to try that, and they also had a buyer for WTJH" (Tr. 2051).

39. Goodson testified that on June 4, 1984, he received another telephone call from Lee (and Suttles). During this call, Goodson says that Lee expressed a "lot of concern about the fact that Sara Howell had been in touch with me the proceeding day and what the situation might be with her, whether she might do anything to bother the sale, and in any way throw a monkey wrench into the operation" (Tr. 2053-54). According to Goodson, Lee requested Goodson to use "his influence to keep [Howell] from doing anything to throw a monkey wrench into the sale of the stations" (Tr. 2054).

40. Goodson testified that on June 11, 1984, Lee telephoned him once again (Tr. 2055). On that occasion, Lee asked "if I had met with Sara Howell the preceding week-end." Goodson indicated that he had, in fact, met with Howell on the preceding week-end (Tr. 2055). Goodson says that Dr. Lee allowed as how he would do anything to avoid any problem with Sara Howell, and that Howell had told Goodson "that she needed some protection in writing; Dr. Lee then told Goodson "to draw up the agreement" (Tr. 2055).

41. Following this conversation, a document intended to provide Howell "some protection in writing," the so-called "Mutual Recognition and Agreement," was drafted by Goodson, with Howell's acquiscence, for the signatures of Sara Howell Brown[3] and Dr. Lee (MMB Ex. 9; Tr. 2006, 2056, 2062). After noting that Sara Howell "is the legal and rightful owner of 30% of all the holdings of Southeastern Broadcasting System, Inc., including Radio Stations WMJM & WFAV . . . which are being sold," the "Mutual Recognition and Agreement" described the situation thusly:

> "Sara J. Howell was employed by Southeastern Broadcasting System, Inc., from 1957 through April 13, 1984 (approximately 27 years). During the major part of that employment period, she served as Secretary-Treasurer of the corporation. Her letter of resignation was submitted on April 13, 1984, and the reason given was unjustified harrassment from the owner. The exact details of that harrassment defy description in a legal document among reasonable and decent persons, but exist in writing if needed for filing with FCC or other legal body . . . .
>
> "Mrs. Sara J. Howell Brown states that during the last several months (and in particular the last several *weeks)* of her employment by Southeastern Broadcasting System, Inc., she was victimized in a fashion to which only a female can be victimized, and subjected to the most degrading form of abuse and harrassment, at the hands of her employer. She contends she has in her possession written documents which will prove this unbearable abuse beyond a shadow of a doubt . . . . She further contends that this harrassment was purposely and deliberately conceived, contrived, created and concocted by the majority stockholder of Southeastern Broadcasting System, Inc., for the wrongful purpose of forcing her resignation and denying to her a rightful share (30%) in the interest, principal and other benefits to be derived from the sale of the radio stations WMJM & WFAV.

Being "absolutely satisfied" that the filing of a complaint against the pending distress sale with the FCC, or the institution of "injunctive action through the Crisp County Superior Court," or the filing of a complaint with the Equal Employment Opportunity Commission, would be "entirely proper, Howell nevertheless, by the "Mutual Recognition and Agreement," offered to forebear pursuing any of these courses of action. Specifically, the following agreements were contemplated:

> A. Sara Howell Brown will file no action with the FCC and take no action through any other legal body until the action approved by the FCC has been executed--provided, however, that the approved sale be diligently pursued and carried out in the period specified by the FCC, or within a reasonable period thereafter.
>
> B. Dr. John Robert E. Lee agrees that in the event he should elect to resell either or both of the Radio Stations WMJM and WFAV, to any party, he will not do so without taking every step to insure the 30% interest of Mrs. Sara J. Howell is satisfied, and he understands that should he fail to do so, Sara Howell would still retain the right to take the legal action she would have otherwise taken earlier, and he accepts the fact that she fully intends to take such actions only if her interest is in jeopardy, such action being void of malice toward Dr. John Robert E. Lee. (MMB Ex. 9).

42. In a June 17, 1984, letter transmitting the draft "Mutual Recognition and Agreement" to Dr. Lee, Goodson wrote the following:

> "I have gone over the matters which you, I and Doc Suttles recently discussed at length with Sara Howell (Brown). Altogether I have seen with my own eyes documentation of treatment which Ms. Howell endured, so cruel and wicked that it defies description among gentlemen. But I assure that her resignation is very real and this is no trick. I am now totally convinced. I also believe with all my heart that if Mrs. Howell chose to file this information with any legal body, there would be no sale of any kind--not because of any shortfall on your part or anyone else's save the one in question . . . .
>
> "The subject of this letter knows the personality of Mrs. Howell. He knows she would never stand still after being subjected to such abuse and wicked treatment. There is not one iota of doubt in my mind, or in the mind of Mrs. Howell, that he fully intends for her to file a petition with the FCC or an injunction in superior court. This would allow him to hold onto the stations for another year or so and would discourage you as a purchaser.
>
> "Therefore, I am glad to inform you that all agree that Mrs. Howell will take no action which will play into his hands and work against your best interest.

As for myself, I certainly intend to take no such action, as my interest has always been with whatever Doc Suttles wants." (MMB Ex. 9).

43. Goodson testified that on June 19, 1984, Dr. Lee telephoned him again (Tr. 2057). During this conversation, Lee told Goodson that he had an agreement with James Rivers regarding the Cordele radio stations, an agreement whereby he would "attempt" to sell the Cordele stations to Ronald Rivers (Tr. 2060).

44. According to Goodson, on July 22, 1984, Dr. Lee telephoned Goodson at his "home on Sunday night at 8:30" (Tr. 2060). During this conversation, the "Mutual Recognition and Agreement" was discussed with Dr. Lee, and Lee indicated that he could not sign the document on advice of counsel, but that he would still honor the spirit expressed there (Tr. 2061).

45. According to Goodson, on July 29, 1984, he received another telephone call from Dr. Lee (and Suttles) (Tr. 2063). In this conversation, Lee indicated that he would file an application to sell the Cordele stations back to the Rivers, and that he would tell Mr. Rivers in no uncertain terms that Sara Howell had to be paid the money that was due her upon the sale of those stations (Tr. 2064).

46. Goodson claims that on December 2, 1984, Dr. Lee placed another call to him. This time, Dr. Lee said that he had finally bought the stations, and also that he would keep his promise, as expressed in the "Mutual Recognition and Agreement," to see to it that Sara Howell was paid for her interest in the Cordele stations (Tr. 2066).

47. Goodson testified that in a phone conversation with Suttles on August 29, 1984, Goodson was told that Silver Star was still planning to carry through on "that agreement" to sell back to Ronald Rivers (Tr. 2069). This call was said to have been initiated by Suttles (Tr. 2069).

48. Mr. Goodson claims that he recorded two of the aforementioned telephone conversations on tape. He says that he recorded the August 29, 1984, conversation with Suttles, and the July 29, 1984, conversation with Lee and Suttles (Tr. 637, 2080-81).

49. Goodson testified that both of his tape recordings were made in the control room at the cable television station which he owns in Cordele (Tr. 2099). He also claims that he made transcripts of those tapes (Tr. 2100). He testified that he reviewed those transcripts about a week prior to the giving of his testimony (Tr. 2100). He also claims to have made notes of these conversations (Tr. 2102): "Starting on April 12, and going on through December 2, and April 12, 1984, I made notes and/or memoranda of the gist of the conversations" (Tr. 2102). He says that he was "afraid;" he did not know why Dr. Lee should be calling him about the particular matters, "and I was afraid if there was some kind of agreement or some kind of trick between [Lee] and Mr. Rivers, and I wanted to document it in the event something happened to me again as it had before. . . And so, I made a record" (Tr. 2102). Goodson testified that he made his notes regarding the calls within a day or two of the calls themselves, "while it was still very fresh" (Tr. 2109). Bureau counsel represented that certain notes were in fact in existence, and offered to produce them if requested by Silver Star. Silver Star declined the offer (Tr. 2112) and no such notes are in the record.

50. Dr. Lee testified that after the provisions for an option were removed from the Memorandum of Intent, there continued to be discussions with the Rivers about the possible purchase of the Cordele stations by Ronald Rivers, but no agreement was ever reached (Tr. 185). Additionally, because the Cordele stations were unprofitable, Lee desired to get rid of those stations as quickly as possible, "in a legitimate, legal manner" (Tr. 186). He told Ronald Rivers that if the FCC would allow it, he would not object to selling the Cordele stations to him (Tr. 186).

51. Lee testified that he has talked to Goodson on the telephone and that it was Goodson who called him on most occasions (Tr. 200). Lee testified that he may have discussed with Goodson Silver Star's intention to sell the Cordele stations back to Ronald Rivers, although he could not recall a particular instance in which such a discussion took place (Tr. 188).

52. Dr. Lee testified that he might have telephoned Goodson in approximately April of 1984, but he had no specific recollection of having done so (Tr. 189). Lee does say that since Goodson was a former engineer at WJIZ, that he probably did discuss matters regarding the technical upgrading of WJIZ with him at some time (Tr. 189-90). In fact, Lee did recollect that in at least one of his conversations with Goodson, he asked if Goodson would be available to work for him as a consulting engineer (Tr. 192). Lee denies that he ever told Goodson he was committed to selling the Cordele stations back to Ronald Rivers and Sara Howell (Tr. 190). Lee also denies having told Goodson that the Rivers had made him promise to sell Cordele back to Ronald Rivers and Sara Howell under the threat of the Rivers finding another buyer (Tr. 191).

53. In at least one of their telephone conversations, Lee did tell Goodson that he planned to offer to sell the Cordele stations back to Ronald Rivers if the FCC approved the sale (Tr. 193). He also told Goodson that he planned to sell WTJH as soon as he obtained it (Tr. 194). Lee denies having told Goodson that James Rivers demanded that the Cordele stations be sold to Ronald Rivers (Tr. 194).

54. Dr. Lee testified that he may have telephoned Goodson during early June 1984 (Tr. 195). In any event, in one of these conversations, Goodson told Lee that he, Goodson, had been in contact with Sara Howell (Tr. 195). Finally, Lee testified that he could possibly have called Goodson later in June, during which time the "Sara Howell situation" was discussed again (Tr. 195).

55. Lee admits that in about June of 1984, he did have some concern that Sara Howell might somehow delay the acquisition by Silver Star of the Rivers' stations (Tr. 202-3). He claims that Goodson told him that Sara Howell might be considering some kind of action to block the sale of the stations to Silver Star (Tr. 212). He did tell Goodson that, upon the advice of his counsel, he (Lee) would not sign the "Mutual Recognition and Agreement (Tr. 196, 202, 204).

56. Lee denies that he discussed with Goodson any actions that Lee might take in order to assure that Howell's 30% interest in Southeastern Broadcasting was preserved for her, since "I don't know any actions that I could take . . . other than executing that document my attorney specifically told me not to sign" (Tr. 205). Lee denies that he ever told Goodson that he could ensure that Sara Howell would get her money out of the stations. The most that Lee said, according to him, was that it

would suit him if Sara Howell somehow got her "rightful share" (Tr. 206-07). Lee denies having told Goodson that he would do whatever he could to make sure that that happened (Tr. 207). He says that what he told Goodson was that there was nothing he could really do to ensure that Howell got her money after Silver Star had sold the stations to someone else (Tr. 208). Finally, Lee denies that he told Goodson that he had to try to sell the Cordele stations to Ronald Rivers or James Rivers would make his purchase of WJIZ in Albany difficult (Tr. 215). Lee denies that he was even concerned with such a possibility (Tr. 216).

57. Mr. Suttles testified that he, Dr. Lee, and Mr. Goodson may have talked in a three-way conversation on or about April 12, 1984 (Tr. 1623). What Suttles remembered about that conversation "if it ever took place," was that Mr. Goodson expressed an interest in determining whether Dr. Lee would see to it that Sara Howell received whatever percentage might be due her in the event of a future sale of the Cordele stations by Silver Star to another purchaser (Tr. 1626-27). Suttles testified that he probably initiated the telephone call (Tr. 1627). Suttles had earlier talked to Goodson, who had indicated a desire to talk to Dr. Lee regarding Sara Howell's interest in the event the Cordele stations were sold by Silver Star (Tr. 1627). That, according to Suttles, was the reason for that particular call (Tr. 1627).

58. Suttles had not seen the "Mutual Recognition and Agreement prior to the time that it was presented to him at the hearing (Tr. 1635), and he had no recollection of ever hearing Mr. Goodson say to Dr. Lee that he, Goodson, was preparing such a document to send to Dr. Lee (Tr. 1637). Finally, Suttles had no recollection of ever having told Goodson that Lee had promised the Rivers that he would sell the stations back to Ronald Rivers.

59. On November 30, 1984, Dr. Lee, his attorney, and James Rivers, Ronald Rivers, Fred Suttles, Fred Finney, and Dr. Charles Finney assembled in Atlanta for the closing (Tr. 255, 1010, 1127, 1647, 1753, 2268, 2413). At the closing, Lee paid the Rivers $1,727,000 for WJIZ and WTJH (Tr. 233). Also, James Rivers, Ronald Rivers, and Tolliver Rivers signed a "Bill of Sale and Assignment" which transferred all of the assets of the four radio stations, excluding the real estate upon which the stations were located and the accounts receivables (MMB Ex. 13). Additionally, Lee and Charles Finney executed a "Promissory Note" to Southeastern Broadcasting in the amount of $400,000 for the purchase of the Cordele stations. Also, certain leases were executed regarding WJIZ, WTJH and the Cordele stations.

60. On November 8, 1984, the Commission adopted a new policy requiring transferees acquiring broadcast stations through the FCC's minority ownership policy to hold those stations for a minimum 1-year period. Lee learned of the development shortly after November 8 and concluded in light of this development:

> ". . . because of the one-year rule, and the immediacy of trying to find management, I think I had about a month period of time that that rule surfaced, between that time and the time we closed, yes, I did try as best I possibly could to secure management. And it was evidenced at that particular time that it appeared as though the only choice and only route I had to go was with Ron Rivers, who was in place already.[4] And I guess, attorney, it has been quite evident since that time as to my difficulty, extreme difficulty in getting a manager to come down and manage a single station operation like Cordele." (Tr. 235).

61. Thus, also at the closing, an "Agreement" was executed by Dr. Lee and Ronald Rivers (MMB Ex. 14), by which Ronald Rivers agreed to be the manager of the Cordele stations, and to report directly to Dr. Lee or to his designated agent. Additionally, Ronald Rivers agreed to submit reports on various station operations to Lee on a monthly basis. Finally, the agreement contained the following provision:

> Silver Star shall pay Rivers Two Hundred and 00/100 Dollars ($200.00) per week plus a fifteen percent (15%) commission on all gross revenues received by stations WMJM and WFAV(FM). Said salary and commission shall be payable only to the extent that the revenues received by the stations are sufficient to pay said salary and/or commission. Should the stations' revenues (after payment of all other station expenses) not be sufficient to pay Rivers' salary or commission for any weekly period, Silver Star shall not be obligated to pay Rivers the salary or commission otherwise due for such period. Rivers shall not accrue any salary or commission not paid him under this Agreement. (MMB Ex. 14).

62. After the closing, in either late December 1984 or early January 1985, Dr. Lee, Dr. Finney and Fred Finney discussed obtaining a new, favorable lease for WJAZ in conjunction with the sale of the Cordele stations to Ronald Rivers (Tr. 463-70, 1922, 2273-78). On January 11, 1985, Lee's attorney drafted an agreement embodying these concepts. The draft provided that James Rivers, Inc., and Dr. Finney (who still owned WJAZ at the time) would enter into a lease concerning the real property at WJAZ; Silver Star granted Rivers, Inc., a one-year option to purchase the Cordele stations at a purchase price of $400,000 (MMB Ex. 13). The proposal was put to James and Ronald Rivers in January 1985. The Rivers took the position that the better procedure would be to separate the provisions having to do with the WJAZ lease and the provisions granting the option to Rivers, Inc., for the Cordele stations (Tr. 1925-27, 2278-79; MMB Ex. 19).

63. Separate proposed agreements were then drafted. Ronald Rivers rejected the proposed option agreement because it provided for Silver Star to retain the accounts receivables for the Cordele stations (Tr. 1665-67, 1923). The early 1985 Bureau investigation of the Cordele stations, however, ended the negotiations between Ronald Rivers and Silver Star regarding the option (Tr. 1168). In early 1986, after the December 30, 1985, transfer of WJAZ from Dr. Charles Finney to Silver Star Communications, James Rivers granted a long-term lease on the WJAZ tower site (Tr. 2290).

II. *The Unauthorized Transfer of Control Issue*

64. Fred Finney assumed his duties as the general manger of the four Silver Star stations on December 1, 1984 (Tr. 1763). One of his duties was to assure that the provisions of Ronald Rivers' agreement to be the station manager of the Cordele stations was followed. Fred Fin-

ney understood that as the general manager of the four stations, he was to be responsible for the day-to-day operation of the stations (Tr. 1766).

65. Prior to the closing, Dr. Lee had intended to obtain a $150,000 line of credit for start-up use at the Cordele stations (Tr. 1756). After closing, Lee was unable to obtain the line of credit; so, other stockholders (Frederick X. Halloway, Bernard Restuccia, Charles Stovall, and Willie Nunnery) were brought into Silver Star in the expectation that their presence would enable Silver Star to obtain the necessary line of credit (Tr. 1745). Silver Star eventually borrowed $100,000 operating capital which was used for the operation of WJIZ only (Tr. 234).

66. On December 7, 1984, Ronald Rivers, upon the authorization of Fred Finney, opened a checking account at the Cordele Banking Company in behalf of "WMJM/WFAV Cordele Radio" (Tr. 1132; MMB Ex. 21, p. 1; Tr. 1767-68). The initial amount deposited by Ronald Rivers was $6,500. He used his own Certificate of Deposit as collateral for this loan and was personally obligated for the payment of the note (Tr. 1172-3). This loan was carried on the stations' Balance Sheet as "Note Payable - Ronald Rivers beginning December 31, 1984 (Tr. 1483; MMB Ex. 24, p. 1). It was necessary for Ronald Rivers to borrow the money to cover the Cordele stations' payroll, since Silver Star had not provided any start-up funds (Tr. 1174).

67. Only one signature was required on the checks for the Cordele stations. As long as Ronald Rivers was station manager, no principals of Silver Star signed checks for the Cordele stations. Ronald Rivers did not need Fred Finney's approval to sign ordinary checks. Since Ronald Rivers never signed any checks that were out of the ordinary, he never needed Fred Finney's approval in this regard (Tr. 1134-5).

68. In January 1985, Ronald Rivers borrowed another $3,500 from the Cordele Banking Company. This loan was mistakenly carried on the stations' Balance Sheet as "Note Payable - Cordele Banking Company" instead of as "Note Payable - Ronald Rivers" (Tr. 1483-84; MMB Ex. 24, p. 3).

69. Lee testified that he did not authorize Ronald Rivers to borrow money for Silver Star. He stated that he learned only after the fact that Ronald Rivers had borrowed money for start-up costs (Tr. 395-96).

70. Although Lee received the Cordele stations' Balance Sheets about a month to 6 weeks after they were prepared, and although he reviewed these Balance Sheets line-by-line, he did not notice the "Note Payable - Ronald Rivers" entry in his review (Tr. 393, 400). Lee claimed that he did not learn about Ronald Rivers' loans to the Cordele stations until the Commission investigation in March 1985. Lee claimed that as soon as he learned of the loans, he immediately went to the bank and transferred the obligations from Ronald Rivers to the corporation (Tr. 401). Silver Star did not actually assume the obligation on these loans, however, until sometime after August 5, 1986, (Tr. 1333). Silver Star assumed these obligations because the monies had been used for the operation of the stations, and Dr. Lee felt that it was "my responsibility and our responsibility to assume the obligation" (Tr. 402).

71. Although Ronald Rivers and Dr. Lee had entered into a written agreement concerning the terms of Ronald Rivers' salary and commission, that agreement was not precisely followed. Ronald Rivers unilaterally decided to pay himself $250 per week after closing, instead of the $200 specified in the agreement. This was the same amount that he had been paid prior to Silver Star's acquisition of the stations (Tr. 1141-42). Ronald Rivers told Denise Woodard, the bookkeeper at the Cordele stations, that he had a contract that entitled him to $250 per week in salary (Tr. 1470-71). Ronald also told Woodard that he would get 15% of the gross monthly receipts as his commission (Tr. 1469).

72. On February 28, 1985, a check in the amount of $1,479.89 was issued to Ronald Rivers as payment of his commission. On March 4, 1985, he was paid $739.95 as a commission (Tr. 1469; MMB Ex. 25, p. 1). Fred Finney did not review these payments (Tr. 1784). Ronald Rivers was paid salary and commission in the following amounts for 1985: first quarter - $7,124.41; second quarter - $9,967.52; third quarter - $2,830.00; fourth quarter - $2,470.00 (Tr. 1472-73; MMB Ex. 25, pp. 3-6).

73. Woodard suggested to Ronald Rivers that he accrue his commissions to save taxes, rather than having checks issued which could not be cashed because of a lack of funds (Tr. 1478-79). Thus, in the July 31, 1985, Balance Sheet, the current liability "Salaries Payable," in the amount of $3,410.03, first appeared (MMB Ex. 24, p. 15; Tr. 1477-8). This "Salaries Payable" item appeared on each monthly Balance Sheet after July 1985. Each month the item increased until June 30, 1986, when the "Salaries Payable item reached $31,543.34 (MMB Ex. 25, pp. 15, 17, 19, 21, 24, 26, 28, 30, 32, 34, 36, 38).

74. Lee did not notice the "Salaries Payable" item on the July 31, 1985, Balance Sheet (Tr. 406-07). According to Lee, he was told by Fred Finney in February or March 1986 that Ronald Rivers' salary and commissions were accruing. Lee told Finney that Ronald Rivers' agreement did not permit accruals when the Cordele stations were losing money. Lee told Fred Finney and Doc Suttles not to worry about the money ostensibly owed to Ronald Rivers as accrued commissions because the management contract would govern the matter, and that contract specifically forbade the payment of commissions while the stations were not showing a profit; and, the stations were not showing a profit. Dr. Lee permitted the ostensible accruals to continue because of the existence of the aforementioned contract provision and because his way of "correcting" the matter would have been by "selling the property, which he was then seeking to do (Tr. 408-14).

75. From December 24, 1984, through March 6, 1985, Ronald Rivers sent five letters to Fred Finney reporting in a general manner on the operation of the Cordele stations (MMB Ex. 22). Sometime after March 6, 1985, Fred Finey excused Ronald Rivers from submitting written reports because Finney felt well enough aware of what was going on at the stations (Tr. 1776).

76. Dr. Lee received reports from Fred Finney concerning the Cordele stations (Tr. 384-85). Lee also received copies of Ronald Rivers' letters to Fred Finney (Tr. 383). Fred Finney continued to report to Lee about the operation of the Cordele stations after March of 1985 (Tr. 390-92).

77. Fred Finney testified that he told Lee in early 1985 that Ronald Rivers was getting a salary beyond that specified in the agreement (Tr. 1912-14). However, Lee testified that he did not personally check to see if Ronald was being paid $200 per week and that he did not ask Fred Finney if Ronald Rivers was being paid that amount (Tr. 354).

78. Beginning in December 1984 and continuing through June 1986, Ronald Rivers issued a check each month to James Rivers in the amount of $500. These payments were purportedly for the rental of a sign owned by James Rivers and used by the Cordele stations for advertising. The $500 was in addition to the monthly rental of $900 for the studio building and land (Tr. 1156, 1175, 1336, 1493; MMB Ex. 38). Even though Lee saw the sign payments on the January 1985 income statement, it "didn't register" with him. He claimed that he was not aware of payments until July 1986. Since there was no contract for the sign rental payments, the payments were stopped in July 1986 (Tr. 403, 1335-37).

79. Ronald Rivers paid some of his personal expenses out of the Cordele stations' funds. These expenses included electricity, telephone, gas and water for his home, electricity for his boat dock, gasoline for his personal use, various station trade-outs for personal use, and the use of a station employee for personal work. The use of station funds by Ronald Rivers to pay his personal expenses continued from December 1984 through June 1986 and was stopped only after he had been replaced by Donald Karnes as station manager in June 1986 (Tr. 1179, 1312; MMB Ex. 33).

80. Woodard presented Ronald's personal bills to Karnes for payment in July 1986. Karnes contacted Dr. Lee; Lee was shocked, and told Karnes not to pay those bills (Tr. 1312-14). Lee then told Karnes to estimate River's past personal bills paid by the Cordele stations. Karnes came up with an estimate of $14,490 (Tr. 1314-26; MMB Ex. 33).

81. Ronald Rivers claimed that he had reached an agreement over the telephone with Dr. Lee in March 1985 whereby Rivers would deduct his personal expenses against his commissions (Tr. 1179-80). Lee claimed that he first learned of Ronald Rivers' payment of his personal expenses out of the Cordele stations' funds from Willie Nunnery some time in the first half of 1985. According to Lee, Nunnery then conducted an investigation to determine whether the accusations against Rivers were true. After confirming that Rivers had indeed used station funds to pay his personal expenses, Lee fired Ronald Rivers (Tr. 436-50).

82. While Ronald Rivers was the manager of the Cordele stations, all rent checks for $500 and $900 were issued promptly on a monthly basis to James Rivers (Tr. 1136). After Donald Karnes took over management of the Cordele stations, he learned that the rent checks for the studio and the sign had never been deposited (Tr. 1546-47). In July 1986, James Rivers called Mr. Suttles and told him that he was owed $20,000 in back rent. Silver Star wrote a check to James Rivers for $16,200 (18 months at $900 per month) on September 25, 1986 (Tr. 1668-70; SS Ex. 3). Suttles did not pay James Rivers for the sign rental in accordance with Dr. Lee's direction (Tr. 1670).

83. Beginning with the February 28, 1985, Balance Sheet, the uncashed rent checks to James Rivers and uncashed commission checks to Ronald Rivers were carried on the Balance Sheet for the Cordele stations as "Cordele Banking Company - Overdraft" (Tr. 1485-89; MMB Ex. 24, p. 5; MMB Ex. 49, p. 3). By June 30, 1986, this item had reached $23,412.08 (MMB Ex. 24). Although Lee saw each month's Balance Sheet, he was not aware of what the "Cordele Banking Company - Overdraft" represented (Tr. 405). As of June 1986, Lee believed that the "Cordele Banking Company - Overdraft" item was money that Ronald Rivers had gotten from the bank without Silver Star's permission, and which Silver Star did not have to repay (Tr. 421-24). Lee later testified that he thought the "Cordele Banking Company - Overdraft" "was probably an erroneous entry" (Tr. 428).

84. On December 1, 1985, Silver Star attempted to make the first partial payment of $30,000 for interest due on the $400,000 note to Southeastern Broadcasting System, Inc. (Tr. 368-72; MMB Ex. 34). This check was never deposited by James Rivers or Southeastern. James Rivers understood that the December 1, 1985, check was lost in the mail; he eventually called to have the check replaced (Tr. 1046-47, 1077-78). Fred Finney was aware of the $30,000 payment, and he was also aware that the check had not cleared the bank. (Tr. 1754). Lee testified that he became aware in early 1986 that the December 1, 1985, $30,000 check had not been cashed. Lee claimed that he did not know why the check was not cashed, and that there was no agreement with anyone to hold the check (Tr. 375-76). A replacement check in the amount of $30,000 was ultimately issued by Silver Star on June 13, 1986 (Tr. 374).

85. Donald Karnes took Ronald Rivers' place as manager of the Cordele stations on June 4, 1986. Nevertheless, Rivers continued to receive salary payments of $250 per week through July or August 1986. Lee testified that the reason payments were made to Rivers after he was dismissed as station manager was because of Willie Nunnery's advice to him to avoid litigation with Ronald Rivers over Rivers' former employment (Tr. 455-56).

III. *The Discovery Issue*

86. On June 13, 1986, the Mass Media Bureau served its first set of interrogatories upon Silver Star (MMB Ex. 59). Also on June 13, 1986, the Bureau filed its motion for production of documents (MMB Ex. 60). By June 13, 1986, Silver Star had decided to use the legal services of Willie Nunnery in connection with the revocation proceeding. It was Nunnery who assisted Silver Star in preparing its answers to the Bureau's interrogatories (Tr. 2969-72).

87. With respect to the motion for production of documents, Nunnery requested Silver Star's former attorney, Fred Cooke, to turn over, at Cordele's deposition, any relevant documents that he might have in his possession. Nunnery asked Lee and Suttles for any documents that they might have. He did not ask Dr. Charles Finney for any documents because he did not think that Dr. Finney had any (Tr. 2983-84). Nunnery believed that the Bureau would obtain all the relevant documents at deposition sessions since he claims that he instructed all the Silver Star deponents to bring relevant documents with them (Tr. 2984, 3052-53; MMB Ex. 62, pg. 14). However, Fred Finney testified that Nunnery never asked him to provide any documents to the Bureau prior to his deposition (Tr. 3029-31).

88. Silver Star filed its answers to the Bureau's first set of interrogatories on July 15, 1986 (MMB Ex. 59), pp. 11-22). In response to interrogatories 9, 11, 25, 26, and 29-33, Silver Star stated that it would provide chronologies of events that had occurred. Silver Star never provided those chronologies because Nunnery thought it would have been "redundant after July 15, 1986. Silver Star

contends that the Bureau received its answers to these interrogatories in depositions and at the hearing (MMB Ex. 62, p. 14, Admissions 15 and 16).

89. The documents provided by Silver Star in response to the Bureau's motion for production of documents came from Nunnery, Lee and Suttles (Tr. 2992-93). The additional documents provided by Cooke at Cooke's deposition were seen by Nunnery for the first time at Cooke's deposition (Tr. 2988-91). Silver Star never objected to the Bureau's motion for production of documents (Tr. 3005).

90. Nunnery stated that he did receive a copy of the Bureau's motion to compel answers to interrogatories. However, Silver Star never opposed the Bureau's motion to compel. Lee said he never saw the Bureau's motion to compel and was not aware that the Bureau was dissatisfied with Silver Star's answers (Tr. 3053-35). Nunnery claims that he never saw a copy of the presiding judge's *Order*, FCC 86M-2964, released October 1, 1986, granting the Bureau's motion to compel (Tr. 2994-95; MMB Ex. 61). In any event, Silver Star never made an effort to update or complete its answers to the Bureau's interrogatories (Tr. 2985-86; 2997-3000).

91. In its answers to the Bureau's first set of interrogatories, Silver Star stated that it had paid $30,000 on the note to Southeastern in November 1985, and $10,000 on the note in May 1986 (MMB Ex. 59, p. 21). Silver Star did not report a June 1986 payment that was made to James Rivers several weeks before the answers to the interrogatories were filed. Silver Star denied that its answers were misleading, but conceded that the answers were incomplete (MMB Ex. 62, p. 15). Nunnery attributed these incomplete answers simply to the fact that he was unaware of the June payment when the interrogatories were answered (Tr. 3004).

IV. *The WJIZ Application Issue*

92. When WFAV(FM) was first licensed by the FCC in 1968, that station's 1 mV/m contour overlapped the 1 mV/m contour of WJIZ(FM). The amount of overlap was increased in 1971 when the WJIZ license was modified. The Commission mistakenly licensed WFAV in the first place and, subsequently, mistakenly approved the modification of the WJIZ license. The Bureau discovered these errors during the 1983 Rivers renewal proceeding. With the Bureau now aware of its errors, the 1984 *Memorandum Opinion and Order* approving the distress sale of the Rivers' stations contained the following conditions:

> (1) Silver Star may not seek to modify either facility in a manner that would increase the existing 1 mV/m contour overlap between WFAV and WJIZ; and
>
> (2) Silver Star is prohibited from transferring both WFAV and WJIZ to the same entity or entities under common control. In effect, the existing multiple ownership violation by WFAV and WJIZ will be grandfathered until any future transfer assignment of those stations by Silver Star (MMB Ex. 53; pp. 6-7).

93. Lee was aware of the existing 1 mV/m overlap between WJIZ and WFAV before he purchased the Rivers' stations. His lawyer advised him, though, that the FCC would grandfather the overlap if Silver Star purchased the stations (Tr. 3064-66). In 1986 Lee decided to file an application with the FCC to increase the antenna height of WJIZ (Tr. 3073-75).

94. Lee's decision to file the upgrade application was prompted by the FCC's April 21, 1986, *Order* "Reclassification of Class C FM Facilities, in Docket No. 80-90, requiring FM stations to upgrade their facilities by March 2, 1987. He believed that he would have to upgrade WJIZ's facilities by March 2, 2987, in order to prevent the downgrading of WJIZ from Class C to Class C 1 or C 2 status. This downgrading would have resulted in future antenna height restrictions against WJIZ and possible short-spacing from new FM stations in the Albany, Georgia, area (Tr. 3072, 3122-33).

95. Lee retained the engineering firm of Bromo Communications, of St. Simon's Island, Georgia, to prepare the WJIZ upgrade application (Tr. 3082-83). Clifton G. Moor was a member of Bromo Communications, and on January 30, 1987, Lee called him to discuss the effect that the WJIZ application would have on the overlap situation with WFAV. Moor told Lee that the overlap "would be doubled" and sent Lee a map depicting that increase. In a January 30, 1987, letter accompanying the map, Moor informed Dr. Lee that the present overlap with WFAV involved about 50% of WFAV's 1mV/m contour, while the upgrade application, if granted, would result in a 100% overlap (Tr. 3086, 3090-91; MMB Ex. 62, pp. 10, 17; MMB Ex. 65; MMB Ex. 70, p. 2).

96. Lee understood that the WJIZ application, if granted, would result in increased overlap with WFAV. Since 1984, Lee also had a "continuous awareness" of the condition ostensibly prohibiting Silver Star from seeking to modify the facilities of WJIZ in a manner that would increase the existing overlap with WFAV (Tr. 3093-95). Lee reviewed the engineering portion of the application completed by Moor, signed the application on January 30, 1987, and sent it to the FCC (MMB Ex. 62, pp. 10, 17; MMB Ex 66). Lee did not seek any legal advice about the application before January 30, 1987 (Tr. 3013-15, 3093, 3122).

97. The WJIZ upgrade application tendered by Silver Star did not depict the existing contours of WJIZ or WFAV. The application also did not mention the existing and projected overlap situation between the two stations (MMB Ex. 66). According to Lee, he "assumed" that the March 2, 1987, Class C FM station filing deadline "superseded" the condition in the 1984 *Memorandum Opinion and Order* (Tr. 3105-07). Lee acknowledged that his assumption was not based on any discussions with anyone or on any document (Tr. 3107-08). Lee also assumed that the FCC would either hold the WJIZ upgrade application "in abeyance" pending the outcome of the instant Cordele revocation proceeding, or that the FCC might modify the conditions stated in its 1984 *Memorandum Opinion and Order*. Lee further assumed that the 1984 *Memorandum Opinion and Order* did not preclude him from "trying to make an effort" to upgrade WJIZ (Tr. 3072-73). Lee testified that he filed the application and wanted to "leave it up to the FCC with them understanding the situation in Cordele . . " (Tr. 3086). According to Lee, he thought that the FCC would let him sell the Cordele stations in order to solve the overlap problem (Tr. 3144). On April 16, 1987, the Bureau dismissed Silver Star's upgrade application because it would result in a "substantial" 54% increase in the overlap with WFAV.

Conclusions of Law

98. In 1983, the Commission designated for hearing the renewal applications for radio stations WTJH, East Point, WJIZ(FM), Albany, and WMJM and WFAV(FM), Cordele, Georgia. Because of allegations of program log falsification and licensee misrepresentations at WTJH, all of these licenses were put in jeopardy. To avoid a hearing on these allegations, the Rivers elected to sell their stations in accordance with the Commission's distress sale policy and procedure. Dr. John Robert E. Lee, the Black principal stockholder of Silver Star, moved to take advantage of this purchase opportunity. Although Dr. Lee only wanted WJIZ in Albany, he was willing to buy the other Rivers' stations as well, since he planned to sell those others as quickly as possible.

The Secret Agreement Issues

99. In August 1985, the Rivers and Silver Star agreed that Ronald Rivers and Sara Howell would have a one-year option to acquire the Cordele stations from Silver Star. Because that particular agreement was viewed as possibly running afoul of the intendment of the Commission's distress sale policy, the parties rescinded the agreement. Nevertheless, the Mass Media Bureau urges, "Silver Star and the Rivers maintained a secret agreement to effectuate the sale of the Cordele stations to Ronald [Rivers] as soon as possible." According the the Mass Media Bureau, Dr. John Robert E. Lee and James S. Rivers agreed in, or after, November 1983, contrary to Lee's representations to the Commission, that Lee would sell the Cordele stations to Ronald Rivers after they had been acquired by Silver Star. The proof of the matter is said by the Bureau to be found in the following five Bureau formulations: (l) The Parties' Continued Intent; (2) The WJAZ Bargaining Chip; (3) Lee's Refusal to Sell to Sutton; (4) Lee's and Suttles' Admission to Goodson; and (5) Witnesses' Testimony.[5] In the presiding officer's view, the available evidence does not show the existence of any "secret agreement.

Intent

100. Although there is scant evidence in support of the proposition, it is accepted for purposes of analysis that in August 1983, James Rivers offered his four stations to Lee "only after Lee agreed to sell back the Cordele stations to Ronald" Rivers. That says nothing about a supposed secret agreement to sell those stations to Ronald Rivers (and Sara Howell) *after* the removal of the provisions for an option from the Memorandum of Intent by the parties on or about November 2, 1983. The Bureau posits that Dr. Lee and James Rivers "always intended" that Ronald Rivers be the ultimate owner of the Cordele stations. There is no question but that, until the provisions for an option were removed from the Memorandum of Intent, Lee and Rivers intended that Ronald Rivers (and Sara Howell) would ultimately own the Cordele stations--that is precisely what the provisions for an option were about. But the Bureau, with its breezy assertion about what the parties "always intended," urges the conclusion that the Memorandum of Intent itself was a "sham arrangement:

> "This [Memorandum of Intent] was thinly disguised to transfer the station from the Rivers family to Ronald and Sara, with Lee serving as a strawman.

101. The Memorandum of Intent is not shown to have been "disguised at all, and no evidentiary facts cast any doubt upon its *bona fides*.

102. On the question of what the parties "always intended "following the removal of the provisions for an option from the Memorandum of Intent, the Bureau offers the following: lawyers for the Rivers and lawyers for Silver Star advised their clients that negotiations for the sale of the Cordele stations to Ronald Rivers and Howell could not occur until Silver Star had acquired the stations. "Thus," urges the Bureau, "in view of this legal advice and Ronald's and Sara's demonstrated interest in purchasing the Cordele stations, it is concluded that Lee, Ronald and Sara signed the documents removing the [provisions for an] option and restricting Ronald's and Sara's employment at the stations in order to placate [the judge presiding in the renewal proceeding] . . . ." This is highly strained reasoning, with no logical necessity about any of it; the presiding officer does not believe that scenario to be supported by the evidentiary record, and it is rejected.

103. The supposed "secret, oral agreement," reached after the provision for an option had been removed from the Memorandum of Intent, is asserted by the Bureau to have "surfaced in written form" as the drafts presented by Dr. Lee and Dr. Finney to the Rivers on and after January 11, 1985. These drafts (which never became any more than that) contemplated that James Rivers, Inc., and Dr. Finney (who then owned WJAZ) would enter a lease concerning the real property at WJAZ; Silver Star would grant to Rivers a one-year option to purchase the Cordele stations, while Silver Star would retain the accounts receivables for the Cordele stations. These contemplated agreements were never effectuated because of disagreement among the parties--a fact contradictory of the Bureau's claim that a settled agreement "surfaced in written form."

WJAZ " Bargaining Chip"

104. The Bureau claims the next element "establishing the existence of the secret agreement between November 1983 and November 1984 was Lee's desire during this time for a favorable lease for station WJAZ." Dr. Lee had first contacted Dr. Finney about purchasing WJAZ in October 1983, and by November of that year had made Finney an offer. That offer was conditioned on, among other things, Dr. Finney acquiring from the Rivers a long-term lease of the station's transmitter site. In December 1983, with Lee's knowledge and consent, the Rivers were presented a proposed lease agreement which included a provision implicitly suggesting Lee's willingness to offer the Cordele stations to Ronald Rivers and Sara Howell. This provision was offered as an inducement, or as a "bargaining chip," to secure the long-term lease that Dr. Lee desired. The Rivers rejected the proposed lease in its entirety, and the matter did not arise again until January 11, 1985, after Silver Star's purchase of the Rivers stations had been closed. At that time, the first of several proposed agreements was drafted, agreements looking toward a long-term lease of the WJAZ transmitter site, and the granting of an option to the Rivers to purchase the Cordele stations. Ronald Rivers rejected the proposed option agreement because it provided for Silver Star to retain the accounts receivables for the Cordele stations. In early 1986, the Rivers granted a long-term lease on the WJAZ tower site.

105. These facts do not establish the existence of any secret agreement between Silver Star and the Rivers during the period November 1983 and November 1984. What is clearly shown is Silver Star's willingness, through Dr. Lee, in December 1983, and no doubt continuing through January 1985, to sell the Cordele stations to Ronald Rivers. Neither the offer of the "bargaining chip" in December 1983, or the resumed negotiations offering an option to purchase to Ronald Rivers in January 1985 evidences the existence of any underlying *agreement* by Silver Star whereby the Cordele stations were to be turned back to Ronald Rivers. The Rivers rejected both the "bargaining chip" in December 1983, and the option offered to Ronald Rivers in January 1985.

Refusal to Sell to Sutton

106. The Bureau sees some evidence of the existence of a "secret agreement" in Silver Star's dealings with Mr. Douglas Sutton, particularly, in what the Bureau calls Dr. Lee's "refusal" to sell the Cordele stations to Sutton. The Bureau focuses solely on the period January-November 1984 to make its claim that, while Sutton was then a serious prospective purchaser of the Cordele stations, "Lee did nothing to pursue a sale to Sutton," because Silver Star intended to sell those stations to Ronald Rivers and "no other buyers were given serious consideration." Rather than tending to prove the existence of a "secret agreement" to sell the Cordele stations to Ronald Rivers, however, the Bureau only proves a matter that needs no further proof.

107. On January 9, 1984, Sutton wrote a letter to Dr. Lee expressing an interest in purchasing the Cordele stations. Having received no response to this letter, about one month later Sutton contacted Silver Star principal Mr. Suttles to inquire about the matter. He learned that Lee had indeed received his January 9 letter, but that Silver had not yet decided what it would do with the Cordele properties; as soon as that matter was decided, Suttles assured Sutton, he would hear from Silver Star.

108. Sometime prior to August 13, 1984, Mr. Suttles contacted Mr. Sutton to see if Sutton was still interested in purchasing the Cordele stations; if so, Dr. Lee would need a letter from Sutton expressing that interest so that Dr. Lee could present it to his bankers. Sutton obliged, and directed such a letter to Lee under date of August 13, 1984. Sutton received no response to this letter, and there were no further discussions about the matter during the year 1984.

109. Sometime prior to August 13, 1984, Suttles requested a letter from Sutton expressing an interest in purchasing the Cordele stations. Thus, it is not correct, as the Bureau asserts, that Silver Star "did nothing" to pursue a sale to Sutton. More importantly, however, it is simply not significant to show that, during the year 1984, Silver Star "intended to sell the Cordele stations to" Ronald Rivers: the December 1983 "bargaining chip and the resumed negotiations resulting in the option offered to Ronald Rivers in January 1985 plainly show Silver Star's willingness and its intention to sell, if possible, the Cordele stations to Ronald Rivers during the relevant time period. There is no mystery about the matter. As of October 5, 1984, Silver Star principal Dr. Charles Finney viewed Bishop Willis as "our number one prospect" for the purchase of WTJH, and viewed Ronald Rivers to be in the same position with respect to the purchase of the Cordele stations. What this evidence fails to show is the existence of a " *secret agreement* " whereby the Cordele stations were to be turned back by Silver Star to Ronald Rivers.

Silver Star's " Admissions to Goodson

110. Mr. William Goodson testified that in a series of telephone conversations with Dr. Lee and Mr. Suttles in 1984, these Silver Star principals admitted to him the existence of a "secret agreement" between Dr. Lee and James Rivers whereby Silver Star would transfer the Cordele stations to Ronald Rivers.

111. Mr. Goodson is a man who delayed for a period of 3 years the making of a complaint to the FCC about possible program log falsification at James Rivers' station WTJH; he came forward only after he had been attacked and severly beaten by persons whom he speculates were "attackers hired by Mr. James S. Rivers and his family." Goodson is a man who harbors deep bitterness against James Rivers also because he believes that Rivers subjected his long-time acquaintance (and now employee) Sara Howell "to the most degrading form of abuse and harrassment." Goodson is a man who took an uncommon interest in attempting to insure that Howell's interest in the Cordele stations was preserved to her. Goodson is a man who appears to have enthusiastically inserted himself into the ongoing transaction between the Rivers and Silver Star regarding the pending sale of the Rivers' radio stations.

112. Mr. Goodson was astonishingly precise about the dates on which the telephone conversations with the Silver Star principals are supposed to have taken place: April 12, May 25, June 4, June 11, June 19, July 22, July 29, August 29, and December 2. He was also astonishingly precise about what he claims was the substance of each of those conversations. His ability to be precise, he says, was due to the fact that, "Starting on April 12, 1984, and going on through December 2 . . . I made notes and/or memoranda of the gist of the conversations." He claims also to have tape recorded two of those conversations and thereafter transcribed them.[6] The reason Goodson gave for having done all of this is that he was "afraid;" he did not know why Dr. Lee, whom he had never met and whom he apparently did not trust, would be calling him, "and I was afraid if there was some kind of trick between [Dr. Lee] and Mr. Rivers, and I wanted to document it in the event something happened to me again as it had before . . And so, I made a record." That record, according to Goodson, was begun to be made from the time of the very first telephone conversation with Lee and Suttles on April 12, 1984. During that talk, according to Goodson, Dr. Lee, whom Goodson had not met, volunteered this bit of "very confidential" information: Lee had already agreed to return the Cordele stations to Ronald Rivers and Sara Howell. Similarly, in a conversation during the latter part of April 1984, Lee is supposed to have told Goodson that he had no choice but to turn the Cordele stations back to Ronald Rivers because "Mr. [James] Rivers had been very persistent that it get back to Ron . . . ." Finally, Goodson claims that Suttles told him on August 29, 1984, that Silver Star still planned to carry through on "that agreement" to turn the Cordele stations back to Ronald Rivers.

113. Dr. Lee and Mr. Suttles deny that any such "admissions" were ever made to Mr. Goodson, and those denials are credited here. Goodson's contrary testimony is not believed. On the witness stand, Goodson was the eager witness, the too-precise witness, the practiced wit-

ness, whose testimony, in its essentials, did not have the ring of truth. This record does not reflect that Dr. Lee ever even hinted at the existence of a "secret agreement," even to any of those persons involved with him in the purchase transaction. Goodson's testimony that Lee volunteered such information to him, a total stranger, in their very first conversation (and subsequently), is simply incredible and is not believed. In the presiding officer's view, Mr. Goodson's testimony was motivated by his deep bitterness toward the Rivers, his belief that his testimony would upset a significant Rivers venture (which would please him), while at the same time strike at Dr. Lee who had been unhelpful to him in his efforts to assist his friend and employee, Sara Howell. Mr. Goodson's testimony provides no credible evidence of the existence of a "secret agreement" by which Silver Star was to turn the Cordele stations back to Ronald Rivers.

Unauthorized Transfer

114. Section 310(d) of the Communications Act states in pertinent part:

> (d) No construction permit or station license, or any rights thereunder, shall be transferred, aassigned or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby.

Traditionally, the Commission has looked beyond legal title in determining whether a transfer of control has occurred; instead, it has defined control as embracing any act vesting in a new entity or individual the right to determine the basic policies concerning the operation of the station. The Commission's concerns are with the basic policies and ultimate control of the station. Day-to-day operation by an agency or employee, guided by the policies set by the licensee are not inconsistent with the statute. *Southwest Texas Public Broadcasting Council*, 49 RR 2d 156.

115. At the closing on November 30, 1984, Ronald Rivers and Dr. Lee agreed that Rivers would be the manager of the Cordele stations. Lee explained the hiring of Rivers as due to the then recent adoption by the Commission of a rule which required purchasers such as Silver Star to hold onto their acquisitions for at least 1 year. The new rule was adopted on November 8, 1984. It meant that Silver Star would not be able to rid itself of the Cordele stations in a very short time, as it had wished to do. Lee testified that "because of . . . the immediacy of trying to find management, I think I had about a month period of time that that rule surfaced, between that time and the time we closed . . . and it was evidenced at that particular time that it appeared as though the only choice and route I had to go was with Ron Rivers, who was already in place." Silver Star proceeded to abandon control of the Cordele stations to Ronald Rivers.

116. Silver Star set no policies for the operation of the Cordele stations. Instead, it was perfectly content to let Ronald Rivers operate those stations after closing just as he had prior to closing. Silver Star did very little to assert control. It provided no funds for start-up operations. Ronald Rivers borrowed $6,500, and then $3,500, to finance initial operating costs. Rivers borrowed this money in his own name, and it was secured by his own assets. This activity clearly reflects Rivers' belief that he had a significant stake in the operation and control of the stations; most likely, this activity reflected Rivers' belief that he would someday own the Cordele stations. While Dr. Lee was unaware of these loans, Silver Star principal Fred Finney did know about them, and Silver Star was happy to have Ronald Rivers use his own money.

117. Silver Star took no action to enforce the terms of Rivers' employment agreement during the time that he was station manager. Rivers paid himself a salary in excess of the amount specified in the agreement, and he accrued commissions contrary to his employment agreement. These breaches were known to Silver Star. The financial statements for the stations were virtually ignored by all Silver Star principals. None of those principals noticed that Rivers was accruing his commissions on the stations' balance sheets and that this item, "Salaries Payable," had reached $31,543.34 by June 30, 1986. None of the Silver Star principals noticed that the Cordele stations had an overdraft at the Cordele Banking Company that had grown to $23,412.08 by June 30, 1986. None of the Silver Star principals ever questioned the salary or personal expenses that Rivers was paying for himself. None of the Silver Star principals questioned the loans obtained by Rivers for the Cordele stations until after the Commission investigation began in March 1985. None of the Silver Star principals noticed that Silver Star's check for $30,000 to James Rivers was not deposited for more than 6 months. Silver Star never assumed real control of the Cordele stations. Instead, Ronald Rivers continued to operate and control those stations after closing just as he had before closing.

118. Silver Star gave a written assurance to the Commission that no agreements existed for the sale to, or the employment of, Ronald Rivers in connection with the Cordele stations. Dr. Lee executed an affidavit on November 2, 1983, stating that Silver Star:

> ". . . has made no agreement, understanding, commitment, or other arrangement, written or oral, whereby [Silver Star] has committed to continue any employment or other relationship with Silver Star . . of Ronald Rivers or Sara Howell should Silver Star . . . become licensee of stations WJIZ-FM, Albany, WTJH, East Point, or WMJM/WFAV, Cordele . . . .

The Bureau contends that this affidavit stated a lie, since Silver Star "always intended" to sell the Cordele stations to Ronald Rivers.

119. No evidence shows that on November 2, 1983, Silver Star "intended" to sell the Cordele stations to Ronald Rivers or to employ him there. And, the affidavit does not speak to future intent at all. It does not state that Silver Star would not, at some future time, "intend" to, and indeed, offer to sell the stations to Rivers or employ him there. That affidavit is not at all inconsistent with a later-formed intent to act in the manner in which Silver Star acted in fact.

120. Where an unauthorized transfer of control has taken place, Commission precedent makes it clear that license revocation is not always warranted unless the transfer was accompanied by a deliberate attempt to con-

ceal it through misrepresenatition. *Blue Ribbon Broadcasting, Inc* 90 FCC 1023 (Rev. Bd. 1982); *Stereo Broadcasters, Inc.*, 87 FCC 2d 87, 49 RR 2d 1263 (1981). Here, it cannot be said, as the Bureau urges, that the referenced Silver Star "statement[s] to the Commission were intentionally deceptive and lacking in candor." Silver Star's unauthorized transfer of control of the Cordele stations does not warrant the revocation of its licenses.

The Discovery Issue

121. It is concluded that Silver Star, with its sorry performance during discovery, abused the Commission's hearing process by failing to respond fully to the Bureau's discovery requests and to the presiding officer's order compelling answers to interrogatories. These failures, however, were not so egregious as to require Silver Star's disqualification.

The WJIZ Application Issue

122. The FCC's errors in licensing WFAV in the first place, and later granting a modification of the license for WJIZ, went undetected from 1968 to 1983. To protect itself from further "errors" in this regard, the FCC included a prohibition in the 1984 *Memorandum Opinion and Order* approving the distress sale, a prohibition purporting to forbid Silver Star from even *asking* for a modification of WFAV or WJIZ in a manner which would increase the existing overlap. Because Dr. Lee had the temerity, through the filing of the WJIZ upgrade application on January 30, 1987, to ask the FCC for such a license modification, the Bureau argues that Silver Star "abused the Commission's distress sale process;" and because the upgrade application failed to mention either the overlap problem or the 1984 "prohibition," Silver Star tried to "pull a fast one" on the Commission.

123. Surely, in these circumstances, there can be no meaningful prohibition against a citizen merely *asking* his government for desired relief, and there is truly no harm in asking. Dr. Lee testified that in filing the upgrade application, he wanted to "leave it up to the FCC with them understanding the situation in Cordele . . . ." That was a reasonable position to take and in doing so, Dr. Lee and Silver Star abused nothing.

Ultimate Conclusions

124. Issues (a) and (b) are resolved in favor of Silver Star, since a contrary resolution has not been shown, by clear and convincing evidence, (*Sea Island Broadcasting Corp.* v. *F. C. C.*, 627 F. 2d 240 (1980)), to be warranted. Silver Star wilfully and repeatedly violated Section 310(d) of the Communications Act (Issue (c)) by transferring *de facto* control of Stations WMJM and WFAV-FM, and abusing the Commission's distress sale policy. The imposition of a forfeiture penalty pursuant to Section 503(b) of the Communications Act is warranted. Silver Star abused the Commission's hearing process (Issue (e)) through its failures during discovery. These failures do not warrant license revocation or any other sanctions. Issue (f) is resolved in favor of Silver Star; it did not abuse the distress sale process by the filing of an upgrade application for Station WJIZ. In light of all the evidence adduced, Silver Star remains qualified to be a Commission licensee (Issue (d)).

Accordingly, IT IS ORDERED that (1) the hearing record DOES NOT WARRANT an order REVOKING the licenses of Silver Star for Radio Stations WMJM and WFAV-FM, and (2) Silver Star Communications-Albany, Inc., FORFEIT to the United States the sum of $20,000 for its wilfull and repeated violations of Section 310(d) of the Communications Act.[7]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] WMJM and WFAV(FM) were licensed to Southeastern Broadcasting System, Inc., with James S. Rivers holding 53% of the stock, Ronald Rivers 17% and Sara Howell 30%. WTJH was licensed to James S. Rivers, Tolliver Rivers and the Fulton National Bank (FNB) as Trustee for Ronald Rivers, Tolliver Rivers and the estate of Herschel Rivers (deceased son of James Rivers), with James S. Rivers owning 6% of the stock, Tolliver Rivers 62% and FNB holding the remaining stock in trust. WJIZ was licensed to James S. Rivers, Inc., with James S. Rivers holding a 55.4% interest, Tolliver Rivers a 13.2% interest, Ronald Rivers a 13.2% interest and the estate of Herschel Rivers an 18.2% interest.

[2] James Rivers owned the WJAZ tower site property; Dr. Finney's lease on that site was due to expire in March 1985, and Dr. Lee was aware of that fact (Tr. 232).

[3] Sara Howell had since married Eugene Brown, a minister (Tr. 2010). She is currently married to him.

[4] Ronald Rivers was the station manager at the Cordele stations prior to the time that Silver Star acquired them, and continued in that capacity after Silver Star acquired the stations.

[5] With respect to this item, "Witness Testimony," the Bureau argues that the testimonies of Dr. Lee, James Rivers, and Ronald Rivers, denying the existence of a secret agreement, are unworthy of belief. Any necessary credibility findings concerning all of the witnesses who testified are set forth expressly or implicitly in the body of this Initial Decision.

[6] Although some of these notes, tape recordings and transcriptions were said by the Bureau to be in existence at the time of the hearing, no such notes, tape recordings or transcriptions are a part of this evidentiary record.

[7] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-125

In the Matter of

Annual 1985 Access Tariff Filings
Phase II

ORDER

Adopted: March 10, 1988; Released: March 28, 1988

By the Chief, Common Carrier Bureau:

1. On March 9, 1987, the Commission released an Order requiring local exchange carriers (LECs) to refund unlawful Minimum Monthly Usage Charges (MMUCs) and presubscription change charges. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 1416 (1987) (*Terms and Conditions Order*). [1] The date set for refunds was July 7, 1987.

2. On April 9, 1987, MCI Telecommunications Corporation (MCI) filed a petition for clarification or, in the alternative, partial reconsideration of that Order. MCI refiled its petition on June 4, 1987. Also on April 9, 1987, the GTE Service Corporation (GTE) filed a petition for partial reconsideration, and on June 5, 1987, New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) filed a petition for reconsideration of the *Terms and Conditions Order*. Responsive pleadings have been filed by several parties.

3. On June 26, 1987, the Bell Atlantic Telephone Companies filed a request for stay of the MMUC refund requirement. In view of these pleadings, the Bureau granted all local exchange telephone companies an extension of time until March 31, 1988, to make refunds of unlawful MMUCs and presubscription change charges in compliance with the *Terms and Conditions Order*. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 7534 (1987).

4. By this Order, we find that additional time is necessary for consideration of arguments raised in the request for stay, the petitions, and the responsive pleadings. Therefore, we hereby grant all local exchange carriers a further extension of time until not later than June 30, 1988, to refund MMUCs and presubscription change charges found unlawful in the *Terms and Conditions Order*. Carriers are advised that the Commission retains its discretion to require payment of interest on any refund amounts.

5. Accordingly, IT IS ORDERED that all local exchange telephone companies ARE GRANTED an extension of time until not later than June 30, 1988, to make refunds of Minimum Monthly Usage Charges and presubscription change charges as required by the *Terms and Conditions Order*.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] A summary of the *Terms and Conditions Order* was published in the Federal Register on May 5, 1987. 52 Fed. Reg. 16,388 (May 5, 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Parts 73 and 74
of the Commission's Rules
Concerning Full Power Television
and Low Power Television and
Television Translator Stations

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1988; Released: April 7, 1988

By the Commission:

1. Before the Commission is an Application for Review filed by The Board of County Commissioners of Monroe County (Monroe County). In its application, Monroe County asks the Commission to review the Mass Media Bureau's dismissal of a rule making petition requesting amendment of Parts 73 and 74 of the Rules.[1]

2. On July 30, 1986, Monroe County filed a petition for rule making requesting modification of the Commission's Rules to provide that new full-service television assignments and low power television and television translator authorizations protect from interference or otherwise eliminate any adverse technical impact on the existing television translator system which serves the Florida Keys with the signals of five Miami television stations.[2] Monroe County described the system as consisting of a total of 25 translators, with five stations located at each of five locations at points along the Keys from Key Largo to Key West. It stated that each translator serves not only the residents of its service area, but relays its signal to the next translator further down the Keys. Petitioner asserted that the protection of each of the individual translators from interference therefore is necessary to preserve the entire translator network, which, it maintains, provides the only off-the-air television service for the county's 65,000 residents.

3. In detailing the potential threat to this translator network, Monroe County noted that the activation of full-service television Channel 35 in Miami, for which a construction permit has been granted subject to further review, would require one of its stations in Islamorada to shut down. Monroe County further noted that an additional threat to the network is potentially posed by three existing Florida UHF allocations in the TV Table of Assignments for which applications are pending (Channel 18, Islamorada; Channel 60, Sebring; and Channel 67, Lake Worth, Florida) and approximately seven full- service TV channels which, according to an engineering statement appended to the pleading, could be assigned to an area approximately 200 miles north of Key Largo. [3]

4. The Mass Media Bureau, pursuant to delegated authority and Section 1.401(e) of the Rules, dismissed the petition without prejudice by letter dated November 21, 1986. The Bureau determined that Monroe County had not demonstrated unique public interest factors warranting departure from the well-established Commission policies that the television translator service is secondary to that of full-service television and is not entitled to primary status over low power television. The Bureau further pointed out that the requested relief was not Monroe County's only remedy, noting, for example, that the use of alternative distribution technologies such as microwave frequencies could be employed to relay signals between translator stations. In addition, the Bureau reminded Monroe County that it may apply for available full-service and low power television construction permits, as appropriate, in order to serve the residents of the county. In response to the Bureau's action, Monroe County filed its Application for Review with the Commission on January 21, 1987.[4]

APPLICATION FOR REVIEW

5. Monroe County first argues on review that the Bureau ignored established Commission precedent and public policy in dismissing its petition. In support thereof, Monroe County cites several Commission policies and rules granting protection to other services. These policies and rules include the "reservation" policies employed by the Commission from the early 1960's until 1982 to reserve FM channels for future use with the underlying objective of ensuring an equitable distribution of FM facilities,[5] and a former provision of Section 73.37(e)(1) of the rules which, during the early 1970's, restricted the addition of new AM assignments in areas that already received two or more aural radio services in order to protect existing radio services. Monroe County asserts that the grant of its proposal would be consistent with these actions in that the Commission would employ appropriate restrictions to protect its existing translator service in furtherance of the mandate of the Communications Act of 1934, as amended, to make communications service available "to all people of the United States." 47 U.S.C. Section 151. In addition, Monroe County cites the Commission's own pronouncements concerning the importance of the translator service which were made in the *Notice of Proposed Rule Making* in MM Docket No. 86-286[6] in support of relief for translator stations displaced by primary service stations.

6. Monroe County also charges that the Bureau afforded it less than the requisite procedural due process in ignoring the engineering statement which it asserts "demonstrated how the relief requested could be granted without any serious erosion of the Commission's policies" with respect to the secondary status of the television translator service. Monroe County further contends that the application of these policies in its situation is contrary to the underlying mandate of Section 307(b) of the Communications Act.[7] Monroe County argues that "[t]he concentration of television services in the Miami area, vis-a-vis the lack of any local television service in Monroe County, is at a variance with the Congressional intent underlying Section 307(b).

7. In its pleading, Monroe County also reiterates its justification for the requested protection, arguing that the integrity of the translator network is now in serious jeopardy because of the encroachment by full-service television allocations and low power television and television translator allocations to the Florida Mainland. In response to the Bureau's assertion that the translator system is not without other remedies, Monroe County submitted an engineering opinion which states that the establishment of a microwave "backbone" system offers only partial relief

from the potential for system degradation due to co-channel interference. The opinion notes that while the microwave system would eliminate interference to the respective translator inputs, it would not eliminate interference to home receiving systems.

DISCUSSION

8. It is well established that the translator service is secondary to that of full-service television[8] and is not entitled to primary status over low power television.[9] While recognizing the substantial contributions made by translator stations in bringing television service to unserved and underserved areas and in providing more diverse programming, the Commission has consistently applied these priorities, which are codified in Sections 74.702 and 74.703 of the Rules. The Commission has never permitted translator stations to preclude or interfere with the activation of full-service stations and recent proposals to elevate the status of the translator and low power television services have been rejected.[10]

9. Without deviating from these policies, the Commission, however, has taken a number of steps to eliminate rules that hinder the translator service. For example, the Commission amended its rules in 1977 to substantially expand the means by which television translators may receive television signals for simultaneous rebroadcast.[11] More recently, in MM Docket No. 86-286, the Commission modified its rules to provide some relief for low power television and translator stations displaced by the authorization of conflicting primary services.[12] The Commission also has acted to facilitate translator service in individual situations if the public interest would be served.[13] In taking these actions, the Commission has assisted television translator stations without eroding its policies with respect to the secondary status of the translator service.

10. In the Application for Review before us, Monroe County contends that its proposal represents a fully justified, limited amendment of the Commission's Rules and, therefore, grant of the requested relief would not erode these policies. We do not agree. Rather, after a careful review of the proposal, we believe the Bureau properly found that the relief requested by Monroe County is directly contrary to our long standing and well justified policies in this area, and that Monroe County has not established public interest reasons sufficient to warrant a departure from them. Monroe County has failed to demonstrate that its situation is unique. Translator stations serving other areas are subject to the same risk of displacement potentially faced by the network serving the Florida Keys. We therefore believe that grant of the requested relief would seriously erode our policies in this area.

11. Moreover, Monroe County has failed to show that the existence of its system is in jeopardy or that a substantial loss in television service is imminent. Monroe County's proposal does not adequately consider the feasibility of working within the framework of our existing rules to fashion a solution to its problem. Ir this regard, we first note that Monroe County does not specifically address the possibility of restructuring its network with new channels and alternative relay systems. Although a new full-service television station may preclude use of a particular translator channel in one or more service areas, it may be possible to move to a new channel[14] and/or utilize alternative distribution means to relay signals to points further down the network.[15] Monroe County acknowledges that some channel substitutions are possible, but disfavors an approach which would burden it with substituting channels and implementing new relay systems, maintaining that the integrity of its system would be in jeopardy under such a "band-aid" approach. However, Monroe County does not specifically identify the impact of restructuring its network, which is approach contemplated by our rules, on its system, and the feasibility -- both economic and technical -- of employing the approach in resolving its problem.

12. Monroe County also has not shown that there is any reason to think it could not reach non-interference agreements with successful applicants for channels on the Florida Mainland. The engineering study submitted by Monroe County states that for some of the potential new channel assignments and for Channel 60 at Sebring and Channel 67 at Lake Worth, the use of appropriate engineering expedients, such as directional antennas by applicants, would protect the integrity of the translator system. Monroe County has not demonstrated that it could not reach appropriate agreements with the applicants. On the contrary, we believe Monroe County's proposal seeks inappropriately to shift the burden of implementing these expedients to the applicants.[16]

13. Finally, we note that the threat Monroe County is facing at this time is to a large extent speculative. The engineering statement appended to the petition states that there are approximately seven potential new television channel allocations in an area about 200 miles north of Key Largo which could be added to the TV Table of Assignments. However, these channels, which are not specifically identified, may never be assigned. In this regard, we are concerned that shifting the burden of resolving potential interference problems to full-service applicants may adversely interfere with the activation of new service in the area. We do not believe this potential harm is justified under these circumstances.

14. In view of the above, we conclude that the Bureau's dismissal of the petition for rule making was fully consistent with Commission policy and precedent. The actions cited by Monroe County as precedent for protecting its network are inapposite. The "reservation" policies employed by the Commission in the FM service and the former restriction on the addition of new AM assignments were developed in the context of implementing and preserving primary aural services. In MM Docket No. 86-286, the proceeding in which the Commission discussed the importance of the translator service, the specific relief that was proposed and subsequently adopted fully recognizes and preserves the secondary status of the translator service. Further, contrary to Monroe County's assertion, dismissal of the petition did not violate the mandates of Section 307(b) of the Act. The Commission has stated that it will not consider Section 307(b) issues in secondary services;[17] and application of the section to elevate the status of a translator station above that of a full-service station or low power station would be inappropriate and inconsistent with the public interest.

CONCLUSION

15. Based on the foregoing, we believe the Bureau fully considered and properly decided the matter. We agree with the Bureau that Monroe County has not set forth public interest factors sufficient to warrant the extraordinary relief requested by its proposal.

16. Accordingly, IT IS ORDERED, That the Application for Review filed by The Board of County Commissioners of Monroe County IS DENIED.

17. IT IS FURTHER ORDERED, That the Petition for Extension of Time filed by The Board of County Commissioners of Monroe County IS DISMISSED as moot.

18. Authority for the action taken herein is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, and Section 1.115 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] As further explained in note 2, *infra*, the proposal advanced by Monroe County would revise Section 73.606, the TV Table of Assignments, and the regulations in Part 74 governing the protection afforded television translator stations from interference from low power television stations and other translator stations.

[2] Specifically, Monroe County suggested that the Commission amend Section 73.606 of its Rules to provide that any television assignment requested within a 200 mile radius of Key Largo (or some acceptable lesser distance), must meet the following criteria:

> 1) It will have no adverse impact on the Monroe County translator system; or
>
> 2) If it would have an adverse impact on the Monroe County translator system assuming non-directional operation with maximum facilities, such assignment would employ appropriate engineering expedients to eliminate any adverse impact to the Monroe County system; or
>
> 3) If such engineering expedients are not feasible to protect the Monroe County translator system, such assignment will not be permitted unless a replacement translator channel is available and awarded to Monroe County.

With respect to protection from low power television and television translator stations, Monroe County requested that the pertinent rules in Part 74 be amended "to provide an appropriate zone of protection" for the translator system.

[3] We note that several applications for review of the recent Review Board decision in the Miami Channel 35 proceeding currently are pending before the Commission, and a notice of appeal has been filed. *See In re Applications of Cuban - America Limited*, 2 FCC Rcd 3264, *erratum*, 2 FCC Rcd 3671 (Rev. Bd. 1987), *appeal pending sub nom. Comuni - Centre Broadcasting, Inc. v. FCC*, No. 87-1331 (D.C. Cir., filed July 16, 1987). Monroe County's petition for leave to intervene in the proceeding was dismissed by the Review Board.

[4] On December 18, 1986, Monroe County filed a "Petition for Extension of Time," requesting additional time, to and including January 21, 1987, in which to file its Application for Review. Given our action herein, we will dismiss the petition as moot.

[5] *See FM Channel Policies / Procedures*, 90 FCC 2d 88 (1982). The "reservation" policies reserved channels by rejecting proposed amendments to the FM Table of Assignments because of their effect on other future assignment possibilities. For example, under one policy, population guidelines were used to hold channels in reserve. These guidelines "were designed to reflect an appropriate apportionment of channels based on the size of the community involved, thus preventing larger cities (where interest in FM had developed) from obtaining a disproportionate share of channels." *Id.* at 95. They were applied both in the creation of the FM Table of Assignments and in addressing petitions to add new assignments to the Table.

[6] *Notice of Proposed Rule Making*, FCC 86-303 (released July 9, 1986). The *Report and Order* in that proceeding, adopted after the filing of the subject application for review, is discussed in notes 12 and 14, *infra*.

[7] Section 307(b), 47 U.S.C. Section 307(b), provides:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States, and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

[8] Secondary status "means that a translator or low power station creating harmful interference to a full-service station must cease operation if it is unable to change its channel or take other steps to correct the interference. Translators and low power stations also are secondary in the sense that they must give way to a full-service station proposing a mutually exclusive use of a frequency." *Low Power Television Service*, 45 Fed. Reg. 69178, 69181 (October 17, 1980).

[9] The Commission's Rules, however, do not permit a subsequent translator or low power station to cause interference to a currently existing translator, "because this would result in destruction of existing service to the public, which is not in the public interest." *Low Power Television Service*, 51 RR 2d 476, 495 n.35 (1982), *recon. granted*, 53 RR 2d 1267 (1983), *stay denied*, FCC 83-447 (September 28, 1983), *further recon. denied*, FCC 83-486 (October 27, 1983); *see also* 47 C.F.R. Sections 74.703 and 74.707.

[10] *See Low Power Television Service (Displaced Licensees)*, 59 RR 2d 1216 (1986) (affirming denial of a rule making proposal to guarantee displaced translator and low power television licensees access to another channel); *see also Memorandum Opinion and Order*, 49 Fed. Reg. 49466 (December 20, 1984), addressing petitions seeking reconsideration or clarification of the *Second Report and* Order in Gen. Docket No. 81-786, which authorized the use of random selection or lotteries to choose from among certain competing applicants. *(Random Selection Lotteries*, 93 FCC 2d 952 (1983), erratum 48 Fed. Reg. 34309 (July 27, 1983), Order Granting Stay of Section 22.23 (a), FCC 83-378 (released August 9, 1983.) In this order, the Commission denied a request to alter the processing procedures for pending television translator and low power television applicants, stating that the proposal directly conflicted with its present views on the fundamental concept of the services as secondary services.

[11] See Amendment of Part 74(F) and (G) and Part 78(B), 67 FCC 2d 209 (1977).

[12] See *Low Power Television and Television Translator Service*, 2 FCC Rcd 1278 (1987). Petitions for reconsideration of this decision, which is discussed further in note 14, *infra*, have been filed to request additional relief.

[13] See, e.g., *Tri-State Television Translators, Inc.*, 17 FCC 2d 186 (Initial Decision, 1969) (interference to direct reception of full-service station permitted where: (1) interference is minimal; (2) translator is only source of over-the-air television service to a substantial number of households; and (3) it would not be economically feasible for translator station to switch channels); *TV Channel Assignment (Williamsport, PA)*, 17 RR 2d 1547 (1969) (channel substitution effectuated to increase number of channels available for translator use).

[14] The rules recently adopted in MM Docket No. 86-286 may facilitate channel substitutions. Under the modified rules, the displaced permittee or licensee may submit an application that proposes operation on a channel on which no other mutually exclusive low power or television translator applications are pending, and which is not predicted to interfere with other applications or authorizations. See *Low Power Television and Television Translator Service*, 2 FCC Rcd 1278 (1987). These applications will not be subject to the filing of competing applications. However, if a "displacement" application is filed during a filing window and found to be mutually exclusive with a new or major change application, it will be processed with the other application.

[15] Translators may use signals from STL's, intercity relay stations, common carrier microwave relay stations, CARS stations and other suitable sources, as well as from other translator stations. See 47 C.F.R. Section 74.731(b).

[16] Under its proposal, a channel assignment would not be permitted if engineering expedients are not feasible and a replacement channel for the translator is not available.

[17] See *Low Power Television Service*, 51 RR 2d at 505.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

MM Docket No. 86-144

In the Matter of

Review of Technical Parameters
for FM Allocation Rules of Part 73,
Subpart B, FM Broadcast Stations

ERRATUM

Released: April 7, 1988

On March 22, 1988, the Commission released the full text of a *Further Notice of Proposed Rule Making* in the captioned matter (FCC 88-87). However, there are several errors in this text. These errors are corrected as follows:

1. In paragraph 5, the parenthetical expression "(91 dB5)" appears. This is corrected to read "(91 dBu)".

2. In paragraph 15, the ordering clause states that it is proposed that "Parts 73 and 74" of the Commission's Rules be amended. This is corrected to read "Part 73". No amendment to Part 74 is proposed.

3. In the Appendix, in paragraph 2 containing proposed rule § 73.207, Table A in rule paragraph (b)(1), the three column headings "Co-channel", "200 kHz", and "400/600 kHz" appeared following the Table. These column headings are corrected to appear on the same line with and between the other two column headings at the top of Table A. Furthermore, the column heading of the right-most column, which was labeled "10.8 MHz" is corrected to read "10.6/10.8 MHz".

4. In footnote 7, the address given for the Commission's copy contractor, International Transcription Services, Inc., is incorrect. The correct address and telephone number is as follows:

International Transcription Services, Inc.
2100 "M" Street, N.W. Suite 140
Washington, DC 20037
(202) 857-3800

5. In footnote 14, the parenthetical expression "(91 dB5)" appears. This is corrected to read "(91 dBu)".

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waiver of

CITY OF TUCSON
Box 27210 7320-04/W-2410
Tucson, AZ 85726

Licensee of station WEG 355
in the Private Operational-Fixed
Microwave Radio Service

ORDER

Adopted: March 16, 1988; Released: April 7, 1988

By the Chief, Private Radio Bureau:

1. The Chief of the Private Radio Bureau has for consideration a request for waiver of Section 94.73(a) of the Commission's Rules[1] filed by the City of Tucson. Section 94.73(a) limits transmitter output to 20 watts in the 2.5 GHz band of the Private Operational-Fixed Microwave Radio Service (OFS). Tucson has filed an application seeking to relocate OFS station WEG 355 with other facilities authorized or pending for microwave channels allocated for the Instructional Television Fixed Service (ITFS). Tucson also wishes to use a transmitter with 100 watts maximum output power at its new location.

2. Tucson states that it intends to use a common receiving antenna and down converter for all of the collocated facilities. It contends that in order to use one receive antenna with all signals being at the same receive level, it is necessary for WEG 355 to have the same transmitter output power level as the ITFS groups, *i. e.*, 100 watts. Tucson alleges that it is not possible with available omnidirectional transmitting antennas to achieve the same equivalent isotropic radiated power (EIRP) using antenna gain and a 10 or 20 watt output from the transmitter. It further states that because of the scattered locations of the schools, plants and hospitals that will receive its signals, a directional antenna is not practical for transmitting, and, because of budget problems, these same entities cannot afford separate or high gain receiving antennas.

3. We find that the potential for co-channel interference will not be increased beyond that permitted under the rules if we allow Tucson to use an output power of 100 watts. This is so because Tucson proposes an EIRP of 61 dBm which is well below the 75 dBm limit allowed by Section 94.73(a)(2).[2] EIRP rather than output power determines inteference. [3]

4. In addition, this station will be collocated with an adjacent channel ITFS licensee. In its *First Report and Order* in Gen. Docket 80-113, 49 Fed. Reg. 25456 (June 21, 1984), the Commission said that in order to have successful adjacent channel operations in the ITFS band transmitting antennas should be cross-polarized, collocated and at the same EIRP. *Id.* at para. 135. Thus, the increase in power would reduce the possibility of adjacent channel interference.

5. We find that Tucson has demonstrated good cause for waiver of Section 94.73(a) and that waiver will not undermine the public interest that the rule seeks to protect.[4] Accordingly, the City of Tucson's request for waiver of Section 94.73(a) of the Rules to permit the use of a transmitter of 100 watts maximum output power for WEG 355 is granted, pursuant to Section 0.331 of the Commission's Rules,[5] for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] 47 C.F.R. § 94.73(a).

[2] 47 C.F.R. § 94.73(a)(2).

[3] FCC Form 402, the OFS license application, asks for EIRP, not transmitter power, under the section titled "Transmitter Information.

[4] Thomas Radio Co. v. FCC, 716 F.2d 921 (D.C. Cir. 1983); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[5] 47 C.F.R. § 0.331.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICHIGAN BELL TELEPHONE COMPANY — AAD 8-1917

Petition for Waiver of the January 1, 1987, Effective Date of the Commission's Five-year Amortization Policy.

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1988; Released: March 30, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On January 28, 1988, Michigan Bell Telephone Company (Michigan Bell) filed a petition for waiver of one aspect of the Commission's January 21, 1988, *Amortization Order*.[1] In that order, the Commission established a five-year amortization period beginning January 1, 1987, for the depreciation reserve imbalances of all LECs subject to Commission depreciation prescriptions that had not been authorized to amortize in prior orders. The Commission stated that, if a carrier would be disadvantaged by a January 1, 1987, effective date, it could file a petition for waiver of that requirement.[2] Michigan Bell seeks permission to begin amortization of its depreciation reserve imbalance on January 1, 1988.

II. MICHIGAN BELL' S PETITION

2. In its petition, Michigan Bell asserts that in its 1987 depreciation filings with the Commission, it requested a January 1, 1988, amortization effective date. Michigan Bell states that it closed its 1987 books on January 11, 1988, and did not accrue any interstate depreciation reserve deficiency amortization for 1987 because the Commission's previous depreciation orders had not required a carrier to book such expenses earlier than that carrier requested. Michigan Bell argues that it would be disruptive and confusing to restate its 1987 earnings to reflect application of the depreciation reserve amortization as of January 1, 1987. Moreover, Michigan Bell states that the company's interstate earnings for 1987 were below the Commission's authorized 12% rate of return. [3] It asserts that a January 1, 1987, effective date would further reduce its earnings below the authorized return and would be "prejudicial and confiscatory". Finally, Michigan Bell contends that its waiver request (a) is consistent with the Commission's general policy that carriers be permitted a reasonable opportunity for capital recovery; (b) would not undermine the goal of implementing a uniform amortization policy; and (c) is consistent with the Commission's policy of flexibility with respect to depreciation rate effective dates.

III. DISCUSSION

3. We grant Michigan Bell's waiver request.[4] Michigan Bell, unlike most carriers seeking amortization authority in 1987, did not request a January 1, 1987, effective date. Under the Commission's Rules, Michigan Bell was not allowed to amortize its reserve imbalance during 1987 because the Commission had not yet prescribed that change.[5] Even so, Michigan Bell's 1987 interstate earnings were below the Commission's 12% authorized rate of return. As mentioned above, if it were required to commence the amortization on January 1, 1987, Michigan Bell's 1987 earnings would be substantially below its authorized rate of return. In view of these facts, allowing Michigan Bell a January 1, 1988, effective date for amortization of its reserve imbalance is consistent with the Commission's policy of allowing carriers a reasonable opportunity for capital recovery.

IV. ORDERING CLAUSE

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that Michigan Bell's petition for waiver of the requirement that it commence its amortization on January 1, 1987, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers*, CC Dkt. 87-447, FCC 88-6, released January 21, 1988 (*Amortization* Order).

[2] Id. at para. 27.

[3] In a letter dated March 17, 1988 Michigan Bell states that earnings for the full twelve months of 1987 are 10.17% for total interstate. The letter states further that if Michigan Bell must include in 1987 the first portion of the five-year amortization, the twelve month earnings would drop to 9.94%.

[4] The Commission delegated authority to the Common Carrier Bureau to rule on requests for waiver of the amortization effective date. Amortization Order at n. 57.

[5] See Section 43.43(e) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-180

In re Applications of

GALI COMMUNICATIONS, INC.
et al.

For Construction Permit
Denver, Colorado

ORDER

Adopted: March 24, 1988; Released: April 7, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On February 19, 1988, Lomas De Oro Broadcasting Corporation and David H. Wagner, d/b/a Denver Communications filed a joint request for approval of agreement which they supplemented on March 3, 1988, and which the Mass Media Bureau supported on March 3, 1988. The Review Board will approve the joint request which fully complies with the requirements of the Communications Act, 47 USC 311(c)(3), and the Commission's Rules, 47 CFR 73.3525(a)(1) and (a)(2). *See Oak Television of Everett, Inc.*, 93 FCC 2d 926 (Rev. Bd. 1983).

2. Wagner has agreed to dismiss its application in return for payment of $60,000 from Lomas in the event Lomas receives the construction permit. Lomas and Wagner have verified that their applications were not filed for the purpose of reaching or carrying out the settlement agreement. And the agreement has been shown to be in the public interest because it will simplify further litigation in this proceeding.

3. ACCORDINGLY IT IS ORDERED That the joint request for approval of agreement filed February 19, and supplemented on March 3, 1988, IS GRANTED, and that the application of David H. Wagner, d/b/a Denver Communications IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-124

In the Matter of

Access to Telecommunications
Equipment and Services by the Hearing
Impaired and Other Disabled Persons

NOTICE OF PROPOSED RULE MAKING AND FURTHER NOTICE OF INQUIRY

Adopted: March 24, 1988 **Released: March 29, 1988**

By the Commission:

SUMMARY

1. This proceeding was initiated to gather information concerning the telecommunications needs of the hearing impaired and other disabled persons and to evaluate the need for consideration of regulatory measures or legislative initiatives to ensure reasonable access to telecommunications services by those persons. Ensuring reasonable access to telecommunications services by all Americans has been, and continues to be, a top priority of this Commission. In the Notice of Proposed Rule Making portion of this Notice, we propose specific changes in our regulations that should increase the ability of the hearing impaired to access telephone service by expanding our regulatory definition of "essential" telephones that must be compatible with hearing aids equipped with telecoils (hereafter hearing aid compatible telephones or HAC). In the Notice of Further Inquiry portion of the Notice, we seek comment on other important and difficult issues involved in ensuring reasonable access to telephone service for the hearing impaired and other disabled persons, and encourage existing groups with expertise in the area to coordinate the development of consensus proposals. For example, we ask for specific proposals for implementing an interstate relay system for users of Telecommunications Devices for the Deaf (TDDs), which would enable deaf and speech-impaired persons to carry on real-time interstate conversations with voice telephone users. We also seek further comment on various other issues on which there is not an adequate record. Finally, this Notice also serves as a report to the Congress of the information gathered to date in this proceeding to aid it in deciding whether to amend the Telecommunications for the Disabled Act of 1982, Public Law No. 97-410 (Disabled Act) to require that all telephones be compatible with telecoil hearing aids. As stated below, we find, based on this record, that various countervailing public interest considerations make it a close question whether this amendment to the Disabled Act should be adopted. On balance, we tentatively conclude that this amendment is not necessary at this time to ensure reasonable access by the disabled to telecommunications services.

INTRODUCTION

2. In response to the Disabled Act, the Commission, on December 1, 1983, adopted specific rules designed to improve the availability of telecommunications equipment and services for the hearing impaired and other disabled persons.[1] These rules: (1) require telephones classified as "essential"[2] to be internally compatible with hearing aids specially designed for telephone use; [3] (2) set forth the technical standards hearing aid compatible telephones must meet; (3) require each telephone package to denote whether the telephone is hearing aid compatible or not; and (4) allow carriers to provide "specialized terminal equipment" to persons with hearing, sight, speech and mobility impairments, and permit state commissions to allow carriers to recover through tariffs "reasonable and prudent costs not charged directly to users of such equipment." During the 1982 Congressional hearings leading to the Disabled Act and in Commission proceedings,[4] it was evident that a segment of the U.S. population was having difficulty obtaining telecommunications services and equipment because of certain physical disabilities. This Commission believed the rules adopted would improve access to telecommunications services by these disabled persons. The rules have been in place for nearly four years. This proceeding was initiated to examine the effectiveness of the current rules, particularly in the wake of recent technological and other changes. On May 15, 1987, we issued a *Notice of Inquiry* (hereinafter NOI)[5] to gather information concerning the telecommunications needs of the hearing impaired and other disabled persons and to provide interested parties an opportunity to comment on what action, if any, is necessary or desirable to assist these persons in obtaining reasonable access to telecommunications services.

3. The Commission currently is restricted from requiring that all telephones be hearing aid compatible.[6] Section 610(b) of the Disabled Act directed the Commission to "require that *essential* telephones provide internal means for effective use with hearing aids that are specially designed for telephone use . . ." (emphasis added). The Disabled Act also specifically directed the Commission, in implementing the Act through regulations, to consider the costs and benefits to "all telephone users, including persons with and without hearing impairments," and to adopt rules that "encourage the use of currently available technology and do not discourage . . . the development of improved technology." 47 U.S.C. § 610(e).

4. In response to these directives we adopted Section 68.112 of the rules. 47 C.F.R. § 68.112. This rule takes cognizance of Congressional intent to allow the continued manufacture and sale of incompatible telephones while ensuring that the needs of the hearing impaired are met. Accordingly, our rules define essential telephones to include coin-operated telephones; credit card telephones where there is not a coin-operated telephone nearby and readily available; telephones in elevators, tunnels and hospital and convalescent home rooms; telephones in ten percent of rooms in hotels/motels; the work station telephones of employees with hearing impairments requiring the use of a telephone to conduct their work assignments; and telephones made available for use by the public in places of business or buildings in which visits by the public are reasonably expected.

5. The NOI first raised the issue whether anything needed to be done to increase the availability of HAC telephones. The Commission has two primary options in

light of the Congressional mandate that only essential telephones be hearing aid compatible. First, we could expand the definition of "essential" under our rules. Second, we could recommend Congress amend the statute. Based on the current record, we are proposing certain changes in our rules that we tentatively conclude, after weighing the costs and benefits, would increase access of the hearing impaired to telephone service and would be in the overall public interest. These changes would expand the definition of essential telephones to include all credit card telephones and telephones located in common areas in a hearing-impaired employee's workplace. We also are seeking comment in our further inquiry on a number of other suggestions that could lead to rule changes. However, we cannot conclude that, based on the current record, it would be in the public interest to amend the statute to require that all telephones be hearing aid compatible.[7] We make this finding because it has not been shown that amendment would be in the public interest. We have doubts about the wisdom of such an amendment because of indications in the record that: 1) there has been an apparent decrease in hearing aids with the telecoil feature; 2) inexpensive alternative portable devices are available which are designed to enhance the hearing ability of persons with hearing disabilities while using a standard telephone; 3) it is not clear that such an amendment would address the actual problems being experienced by the segment of our hearing impaired population that still appear to have unsatisfactory access to telecommunications services; and 4) requiring universal compatibility with telecoil hearing aids could impair the development of new network technology, including fiber optics. Based on this record, it appears that the Congress developed the appropriate public interest balance in the Disabled Act.

6. The Notice of Inquiry also addressed the communications service needs of the deaf and speech-impaired, who access telecommunications services primarily through TDDs. Based on the comments, we seek specific proposals for implementing interstate relay systems of TDDs and seek further information on related issues.

7. Finally, the NOI asked whether an advisory committee should be formed to address issues relating to ensuring reasonable access to telephone service for the hearing-impaired and other disabled persons. Many of the comments indicate that some form of committee is desirable, but it does not seem that a formal federal advisory committee is appropriate. We do not want to foreclose the further participation of any individual or group in this proceeding. Moreover, the comments indicate there currently exist at least two organizations whose memberships include the expertise and the broad-based representation on these issues requested by the commenters desiring establishment of an advisory committee. Accordingly, we encourage these (or other) groups to coordinate the development of consensus proposals that will effectively and efficiently expand access of the disabled to telecommunications equipment and services.

8. We will divide our consideration of the record into four parts: changes to the current rules to expand the category of "essential" telephones; changes to the statute to mandate universal hearing aid compatibility; other matters requiring additional action in the context of a Further Notice of Inquiry; and the possible formation of a federal advisory committee.

CURRENT RULES

9. *Comments.* The comments varied on whether the current provisions of the rules are adequate and whether the Commission should expand the definition of "essential."

10. Self Help for Hard of Hearing People, Inc. (SHHH) is an educational, self-help organization. The majority of its members wear hearing aids. SHHH believes that the current rules have not been more effective because of

> (a) continued widespread ignorance of the rules, (b) delegation of enforcement powers to states adopting the rules, and
>
> (c) inadequate consumer participation in implementation of rules provided for their needs. A combination of these three factors adds up to slow progress toward Congressional intent.

SHHH Comments, p. 1.

11. One area of the Commission's rules SHHH feels warrants strengthening involves the workplace. Section 68.112(c)(2) requires employers to provide HAC telephones only at the work stations of employees with a hearing impairment. To ensure such employees have access to a telephone throughout the work premises, SHHH suggests that employers be required to provide either HAC telephones in whatever areas such employees may have reason to visit, or portable external induction coupling devices.

12. Maryland People's Counsel[8] believes the Commission has not adequately met its Congressional mandate to ensure that *all* the people of the United States have access to communication services. In its view, there is no justification for the Commission establishing a different standard for people with disabilities. The disabled are an integral part of the total population, and share the same problems, family life, and responsibilities as other citizens. MPC thus feels this group should not be segregated and subjected to regulations which limit their access to telecommunications services.

13. MPC believes the definition attached to the term "essential telephones" limits the rights and privileges of the disabled. It feels the term was adopted to meet the needs of the telephone industry, not those of the disabled. Because there is no barrier to preclude the Commission from adopting a broader definition of "essential telephones" and there is a need to expand the availability of communication services for the hearing impaired, MPC recommends that the Commission modify its rules. First it recommends that Section 68.112(c)(1) be modified to include card-operated telephones. Noting that the rule does not require card-operated telephones to be HAC if they are nearby coin-operated telephones, MPC suggests the term "nearby" is relative. To a hearing impaired athlete, it means one thing; to a mobility impaired person, something else.

14. Second, it believes that Section 68.112(c)(2) requires modification, as it now creates a hardship in the workplace. Because the rule requires an employer to place a HAC telephone only at the work station of an employee with a hearing deficiency, the employee's flexibility and mobility are impeded and his usefulness is lessened. To improve employment opportunities and the productivity of such individuals, MPC recommends that Section 68.112 (c)(2) be amended to require employers to install HAC

telephones at all sites within the work premises where hearing impaired persons might expect to need a telephone and that all telephones installed on the premises after a certain date be HAC. Third, it suggests that the Disabled Act allows the Commission to require coin- and card-operated telephones to be equipped with amplifier handsets. MPC contends the additional volume is required by many mildly and moderately hearing impaired individuals as well as those with severe hearing problems. In recognition of the importance of amplifier handsets, MPC suggests that the Commission adopt a rule similar to a law enacted by the State of Connecticut, which requires 25% of coin and card-operated telephone to have amplifier handsets.

15. Finding that the cost of HAC telephones is on par with incompatible ones, the supply of HAC telephones has increased and vendors are now familiar with the Commission's rules, MPC suggests that hotels and motels be required to implement a program of annually replacing 10% of their incompatible telephones with HAC units and all new telephone installations be of the HAC variety. Such a program, MPC feels, will result in hotels and motels being completely accessible to wearers of hearing aids equipped with telecoils within a decade, as well as allowing them to receive telephone service at the same rate as other guests.

16. Finally, MPC relates that many inexpensive telephones fail to provide satisfactory performance even though they meet the minimum magnetic field strength levels defined by Section 68.316. This rule defines the magnetic field strength levels a telephone must meet in order to be classifed as HAC. To rectify this deficiency it recommends that Section 68.316 be modified to increase the minimum acceptable magnetic field strength level or, alternatively, to increase both the minimum and maximum levels but retain the current numerical difference between the levels.

17. GTE also states that the Commission, based upon a proper record, may broaden the definition of "essential telephones." GTE contends hearing aid users should have greater access to telephones in the workplace than in private homes. It believes all business telephones should be classified as "essential." If the Commission decides not to include residential telephones in the essential category, GTE suggests the Commission may want to strengthen the labeling requirement for non-hearing aid compatible telephones to provide consumers with more information regarding the pros and cons of owning an incompatible telephone.

18. Finally, GTE urges that should the Commission decide to classify business and residential telephones as essential it should grandfather refurbished telephones. GTE estimates that the cost of retrofitting a refurbished telephone to make it hearing aid compatible ranges between $2.60 and $4.50, depending upon the style. Imposing this additional cost on refurbishers, GTE maintains, would make refurbishing unattractive because new telephones are becoming less and less expensive, and would probably destroy the refurbishing industry.

19. A report submitted by Gallaudet Research Institute (GRI) discloses that 95 percent of the sample's visually impaired persons were satisfied with their ability to use the telephone, whereas only 20 percent of the hearing impaired and deaf-blind were satisfied.[9] Fifty percent of the hearing impaired surveyed could not hear using a hearing aid; the other fifty percent could hear and understand normal speech when using an assistive listening device at least some of the time with some people.[10] In generally outlining the problems which limit access of the disabled to telephone services, the Report does not associate specific problems with a specific disability. However, certain listed complaints naturally attach to the hearing impaired, *e. g.*, "insufficient volume control," "public telephones without amplified handsets" and "should make ringers louder."[11] On the specific matter of workplace telephone access, some survey participants claim they experience (1) difficulty obtaining employment, (2) difficulty understanding callers, and (3) problems using some telephones.

20. *Analysis*. Section 610(a) of the Disabled Act, 47 U.S.C. § 610(a), states:

> The Commission shall establish such regulations as are necessary to ensure reasonable access to telephone service by persons with impaired hearing.

According to the legislative history, this section of the Disabled Act is intended to direct the Commission's attention to the special communications needs of individuals with hearing impairments. The Commission's mandate to ensure reasonable access to telephone service focuses on establishing regulations and technical standards.

21. While entrusting the Commission with this responsibility, Congress included certain constraints. It enacted Section 610(b) of the Act, which sets limits on the telephones that are to be hearing aid compatible. *See* note 6, *supra*. At the time it enacted this law, Congress believed its action would reasonably satisfy the needs of the hearing impaired. It noted:

> Under no circumstances may the Commission designate as an essential telephone any residential telephone or any other telephone if all the persons who would normally use it do not have hearing impairments.[12]

22. Congress also directed the Commission to evaluate the costs and benefits of any rule changes. That evaluation must also consider costs and benefits to all telephone users, as well as the "social costs and benefits indirectly related to telephone use, including the benefits of reduced institutionalization, increased mobility, and enhanced productivity by disabled persons." House Report, p. 12. Additionally, Congress directed us to ensure that any regulatory changes not impair technological progress.[13] The language of Section 610(b) and its legislative history clearly provide that the Commission may not require universal hearing aid compatible telephones. However, the Commission may modify its definition of essential telephones so long as it considers the costs and benefits of the changed definition.

23. Most commenters support an expanded definition of essential work place telephones. Section 68.112(c)(2) of the rules only requires that an HAC telephone be made available at the work station of the hearing impaired employee, *i. e.*, "the location within a workplace where that employee is usually found in the course of his or her employment duties." The rule was based on language in the House Report that "[a]n employee should have access to at least one compatible telephone . . . ." House Report at 10. But that report also stated "[t]he Committee is concerned that inability to use telephones should not im-

pair the productivity of persons using a hearing aid in their place of work." *Id.* We now propose a rule change to expand the areas where workplace telephones must be HAC to include all common areas that hearing impaired employees may need to access in the ordinary course of their employment. These would include telephones in library, reception, and similar areas. We seek comment on the costs and benefits of this proposal. We also ask what, if any, grandfathering would be appropriate. *See* 47 U.S.C.§ 610(f).

24. We also propose a rule change to require HAC for credit card telephones. Section 68.112(c)(1) of the rules currently provides that such telephones generally must be hearing aid compatible, "unless a hearing aid compatible coin-operated telephone providing similar services is nearby and readily available." The "unless" clause was based on the Commission's interpretation of language in the House Report: "The Committee intends that the Commission employ a common-sense approach; if a usable pay phone is nearby and readily available, the incompatible instrument is not 'needed by the hearing impaired'." House Report at 10. Although MPC has not identified any specific instances where a non-HAC credit card telephone has precluded access to telephone services, our preliminary view is that the benefits of deleting the clause outweigh the costs. As MPC argues, the use of credit card telephones is growing. In addition, the factor governing whether a credit card telephone need be HAC -- whether a coin-operated HAC telephone is "nearby and readily available" -- is difficult to define or enforce. Congress felt so strongly that coin-operated telephones should be HAC that it mandated retrofitting, where necessary. Our records show 12 models of credit card telephones have been registered under Part 68 since 1982, and 10 clearly are HAC. Two applications were granted which did not affirmatively state the telephones were HAC, but it is not clear that the telephones in question are not HAC, and if they are not, what costs would be incurred to make them so. Accordingly, we propose to delete the "unless" clause from Section 68.112(c)(1). We seek comment on the costs and benefits of this proposal. In the event manufacturers are producing and selling non HAC credit card telephones, we ask that they document any costs that would be incurred by our proposal, and state what level of grandfathering protection would be appropriate. *See* 47 U.S.C. § 610(f); House Report at 13.

25. MPC suggests that all new hotel and motel telephones eventually be HAC. There is no indication that the current provisions are not adequate to ensure access by hearing impaired persons to hotel and motel HAC telephones. Therefore, we do not propose at this time to amend that portion of the rule.

26. Thus, we propose two specific changes to our rules to increase the availability of HAC telephones. We also are seeking additional information in our further inquiry on a number of the other suggestions made by commenters.[14]

STATUTORY CHANGES

27. *Comments.* The comments varied on whether we should recommend that the Congress amend the Disabled Act to require that all telephones be hearing aid compatible.

28. SHHH argues such an amendment would disserve the hearing impaired community because as now structured, the proposed legislation would exempt telephones from the HAC standard if they are not required to be registered under Part 68 of the Commission's rules, 47 C.F.R. Part 68. Falling in this category are coin telephones owned by telephone companies. On the other hand, current legislation requires all coin operated telephones to be compatible. SHHH states that the philosophy of "choice" is deeply rooted in our society. It then suggests that the hearing impaired could minimize their problems by educating those persons who buy incompatible telephones to this group's needs rather than seeking federal legislation which eliminates consumer choice.[15]

29. Several commenters state that economical specialized telephone equipment designed for the hearing impaired mitigates the need and demand for HAC telephones. For example, the American Telephone and Telegraph Company (AT&T) notes that it offers the Portable Telephone Amplifier through its National Special Needs Center and Phone Centers. This device sells for approximately $24.95 and easily attaches to any telephone. It transforms an incompatible telephone to a HAC unit or provides 20 dB additional amplification for wearers of hearing aids not equipped with telecoils. It also offers an amplifier handset which may be used with earlier model telephones.

30. AT&T states that, with the exception of its cordless telephones, all telephones it supplies are HAC. To make its cordless units HAC, AT&T claims it would cost an additional $1.50 per unit. Otherwise, a rule requiring universal HAC would not alter its manufacturing costs. It explains it has embedded costs of $0.25 per corded telephone to accommodate HAC.

31. Commenters also argue that requiring universal compatibility could impede innovation which could lower prices and could impede the introduction of new technology. AT&T argues that such a rule could impose additional costs of $0.50 to $1.00 for all future telephones and imposition of technical standards on telephone manufacturers could be useless unless similar standards are imposed on hearing aid manufacturers. Without such there is no guarantee that hearing aid technology will always mesh with that of telephones. Bell Atlantic Telephone Companies contend generally that hearing aid and telephone technologies are changing rapidly and therefore regulatory requirements should not be imposed making their future application impractical. Bell South maintains that the best approach to the issue is one which allows the marketplace to respond to the needs of the disabled. This view is also shared by United States Telephone Association (USTA).

32. MPC recommends that the Commission support legislation now before Congress to require all new telephones to be hearing aid compatible. It feels that, if enacted, such legislation would enable hearing impaired persons to have the same access to the telecommunications network as others, would relieve the Commission of certain monitoring and enforcement responsibilities, and would eliminate the restraining language of Section 610(b) of the Disabled Act.[16]

33. Other commenters also endorse requiring future telephones to be HAC.[17] Ameritech Operating Companies say they do not anticipate any impediments to development and growth of their networks as a result of such a rule. They caution, however, that such a requirement should contain a proviso making HAC mandatory and

uniform on a national basis. Otherwise, incompatible technology might be developed resulting in future stranded plant investment. GTE Service Corporation (GTE) also favors the idea. It discloses that its unit costs for HAC telephones (including cordless ones) range between $0.20 - $0.50. But, it notes, the true cost of such a rule includes more than the unit cost. Legislating a design parameter might impede network technological advances, resulting in a cost too high to pay. Thus, it recommends that the Commission, in evaluating the costs/benefits of universal HAC, may wish to adopt a waiver standard permitting research and development to continue on devices which cannot be made HAC. Alternatively, it suggests that the Commission may want to adopt a "sunset" provision on the HAC requirement which would force a review of the "costs/benefits" to determine whether technological changes warrant retention of the rule. For example, hearing aids' design could advance to the point where magnetic coupling with the telephone would no longer be necessary. In GTE's view, by allowing exceptions to a universal HAC rule, the Commission would be operating within Congressional intent to permit the manufacturing and marketing of telephones incompatible with hearing aids. According to GTE, not only was the intent of the legislation to define essential telephones, but also to allow for the production and retail of incompatible telephones. Without a statutory change, GTE urges, the Commission cannot impose a 100% HAC requirement.

34. Commenters were asked to provide specific statistical data regarding hearing aids and their wearers. All data supplied appear to be based on information originally collected by HIA. In view of that, there is little variation in the information supplied by the parties. Other than the total number of users requiring hearing aids equipped with telecoils, a datum commenters state is indeterminate, the table below display the information requested by the NOI.

TABLE 1

	Total No. of aids sold	Fraction of aids with Telecoils	Total No. of ITE aids sold
1982	854,485	48.5%	359,027
1983	1,029,680	43.5%	508,652
1984	1,102,887	37.8%	638,748
1985	1,136,864	33.6%	730,310
1986	1,268,142	29.5%	893,952
Total	5,392,058	37.7%	3,130,689

	Fraction of ITE aids with Telecoils	Total No. of non-ITE aids sold	Fraction of Non-ITE aids with telecoils
1982	10.1%	495,458	76.3%
1983	10.1%	521,028	76.1%
1984	10.1%	464,139	75.9%
1985	10.1%	406,554	75.8%
1986	10.1%	374,196	75.8%
Total	10.1%	2,261,369	76.0%

Total number of hearing aid users	4.0 million a
Total number of users employing ITE aids	2.3 million b/
Estimated number of users employing telecoils	1.5 million c/

a/ SHHH comments, p. 6.

b/ SHHH comments, p. 5.

c/ Computed by staff. (2.3 million ITE aid users x 10.1% + 1.7 million non-ITE aid users x 76%)

35. Interpretation of the above data varies among the commenters. Our NOI, based on previous available data, stated that the number of hearing aids purchased incorporating the telecoil feature seemed to be declining. SHHH states that the figures show a decline in the retail of telecoil equipped hearing aids. It attributes this reduction to wearers being unfamiliar with that feature of their hearing aids, their refusal to use it or their lack of knowledge of how to use it. HIA also credits the reduction of telecoil equipped hearing aids to the emergence of the in the ear hearing aid model. According to HIA, these units generally are purchased by persons experiencing little difficulty using the telephone. Consequently, they are buying hearing aids without the inductive feature. Accordingly, HIA notes that less than 30% of hearing aid purchasers are buying hearing aids with telecoils, "the necessary other half of the hearing aid compatibility equation."

36. MPC maintains that the purchase of hearing aids actually fluctuated from year to year during the 1980-1985 period. This fluctuation reflects, according to MPC, the variation of incidence of severe hearing loss as opposed to a decreasing trend of relying on inductive reception. Only when there is a decrease in the number of severely hearing impaired or a superior alternative coupling will there be a substantial reduction in the number of hearing aids equipped with telecoils, asserts MPC. MPC observes that in the period 1980 - 1986, approximately 2,865,000 telecoil equipped hearing aids were sold. It argues Congress did not predicate its enactment of the Disabled Act on percentages. Congress was concerned with ensuring that people have reasonable access to telephone service. GTE believes the number of telecoil equipped hearing aids is relatively stable and represents those persons having severe or profound hearing loss. Accordingly, they need HAC telephones and GTE thus urges the Commission to recognize their needs.

37. AT&T, on the other hand, believes MPC's argument does not rebut the inferences the statistics suggest. It explains that it is unlikely that the number of hearing impaired will rise and fall from year to year. The suitabil-

ity of ITE models for the moderately hearing impaired might explain the declining trend in the sale of telecoil equipped hearing aids.

38. None of the commenters identified any anticipated technological advances that would enhance the access to telecommunications services by the hearing impaired. GTE states that regulating technology can be counterproductive without safety valves. Although it is true the telephone network is evolving into a digital network, GTE concludes this does not preclude telephone receivers from generating an adequate magnetic field for coupling with hearing aids. It explains that the human ear is an acoustic input device, which will not be affected by network changes. Regardless of the technology used the final output must be in acoustic energy, it continues. GTE suggests what is most likely to happen is that hearing aid designs will improve to permit acoustic coupling without the adverse feedback prevalent among today's hearing aids. Such a feat would moot the need for HAC telephones.

39. HIA, an organization of firms that manufacture and distribute hearing aids and their component parts, notes that its industry remains committed to the availability of induction coil compatible telephone handsets and hearing instruments. GRI relates that there is no inductive technology substitute on the horizon. Based on its clinical experience, magnetic coupling is the most effective means for the moderately hearing impaired to use the telephone without feedback. GRI further explains that because it is impractical to directly, electrically connect telephones and hearing aids, direct audio input is infeasible.

40. *Analysis*. Although it is clear that the hearing impaired currently are unable to fully utilize telecommunications services, the record before us does not indicate that universal HAC will provide a signficant improvement in the ability of the hearing impaired to access telecommunications services. The comments indicate that there would be an increased embedded cost of between $.25 to $1.50 per non-HAC telephone if Congress were to mandate universal compatibility. In addition, it appears that the use of hearing aids with the telecoil device is on the decline and non-telecoil equipped hearing aids are improving. Universal HAC would also restrict the freedom to design innovative telephones, but the cost of that restriction cannot be quantified with the record before us. Further, as stated above, there are inexpensive alternative portable devices available to enhance the ability of persons with hearing disabilities while using a standard telephone. Finally, it is not clear that such an amendment would address the actual problems being experienced by the segment of our hearing impaired population that still appear to have unsatisfactory access to telecommunications services. After carefully balancing all the facts in the record before us, we reach the same conclusion as did Congress in enacting the Disabled Act; that it does not appear that mandatory universal compatibility would serve the public interest.

FURTHER NOTICE OF INQUIRY

41. The comments indicate there are a number of areas in which a further proceeding may enhance the access of the hearing impaired and other disabled persons to telecommunications services.

42. We seek comment on a number of issues: (1) whether we should propose rules regarding Telecommunications Devices for the Deaf;[18] (2) whether we should propose to amend the rules with regard to amplifier handsets; and (3) whether other rule changes are appropriate.

43. *TDDs - Comments*. Based on the comments filed, only AT&T among interstate carriers currently provides special operator services for TDD users.[19] These services include operator assistance for aiding TDD users in making AT&T credit card calls, third number billed calls, collect calls, person-to-person calls and calls from hotels and motels. In addition, TDD users are offered help in reaching directory assistance operators and provided typed messages of information received from recorded messages. These services are available via a toll free number and accessible 24 hours per day. One additional carrier, U.S. Sprint, does plan to offer this kind of operator service, but does not plan to offer disabled TDD users discounted rates.

44. For the present, GTE maintains that there is a need to standardize the code for TDD devices. Currently two coding schemes are used by TDD manufacturers, Baudot and ASCII. Baudot is the original format incorporated in TDDs and is the least expensive because the equipment is typically older and less complex than ASCII. ASCII is more widely employed among terminal devices, including TDDs and personal computers. Because of its wide use and the possible enlargement of the community TDD users could access, GTE recommends that the Commission require future TDD units incorporate the ASCII format. Electronic Industries Association (EIA), on the other hand, suggests the issue be directed to a user group such as the Telecommunications for the Deaf, Inc., while SHHH urges the Commission to permit the matter to be resolved on a voluntary basis.

45. A number of commenters addressed questions relating to relay services for TDD users, which generally enable TDD users to have telephone conversations with voice telephone users. A few states are offering or are in the final stage of providing manned relay services[20] for TDD users. California provides a system, and, according to the comments, Illinois' and New York's systems should be functional shortly. With the exception of the New York proposal, these programs limit the users to intrastate calls. New York plans to permit interstate calls over its system so long as one end of the conversation is in New York. In addition to these relay systems, there are many private organizations providing manned relay services. To further ease the expense of communicating via these relay systems, some states have ordered carriers providing intrastate toll services within their states to provide such services to TDD users at a discounted rate. On the interstate level, only AT&T offers toll discounts to TDD users. Some of its competitors indicate they would offer discounted rates if they were subsidized, presumably by other ratepayers.

46. Several user groups discuss the problems attendant to existing and planned intrastate manned relay systems. They relate that many users are disappointed and do not understand why communication cannot be established with out-of-state locations. Efforts to obtain these services by state commissions and local telephone companies have been met with jursidictional disputes, notes MPC. According to MPC, both parties (state commissions and telephone companies) argue that local public utility commissions do not have authority to order telephone

companies to provide interstate relay services. This denial of interstate service has meant many deaf individuals have been denied access to relatives and friends in other states. To remedy the problem, NARUC, in a petition for further inquiry, asks that the Commission (a) establish the committee discussed in its NOI to investigate the implementation of interstate relay systems and (b) issue a further notice of inquiry to obtain specific proposal for the committee's evaluation.

47. With regard to possible technological advances affecting relay systems, AT&T reveals that it and other firms are conducting tests on unmanned relay systems designed to recognize speech and transform it to written form and vice-versa. But it indicates the pace of development does not offer any immediate hope of employing this system soon.

48. The Architectural and Transportation Barriers Compliance Board states it is an independent federal regulatory agency charged with insuring that certain facilities designed, constructed, altered or leased with federal funds comply with accessibility standards issued under the Architectural Barriers Act of 1968. It offers to serve on any advisory board the Commission may establish. It states it has sponsored a demonstration, federal government wide TDD relay service since August 1986 that is to expire August 1988. The service is used by federal employees who are TDD users and by others who communicate with those employees, both inside and outside the government. The relay serves approximately 700 persons each month. The board intends to explore the possibility of another organization, either government or nongovernment, administering the relay service as an ongoing activity.

49. None of the commenters revealed any technological advances likely to have an immediate impact on the way communication services are provided the deaf and speech impaired. Some did note that research is under way to take advantage of research conducted in the computer field to improve the communication ability of the deaf. GTE is also conducting some tests. It is attempting to devise a technique which would allow transmitting American Sign Language using a voice grade line and slow speed video techniques.

50. - *Analysis*. Based on this record, we seek specific proposals for an interstate relay system for TDD users. We also believe commenters have raised other issues deserving of further comment by interested parties.

51. The record shows that a number of telephone companies have available an array of devices specifically designed to assist the deaf in accessing the telephone network. Many states also maintain programs which provide equipment for the disabled at little or no cost to the users. Only AT&T offers discounted interstate toll rates and operator services for TDD users. Its competitors explain they would provide discounted rates for TDD users if they were subsidized in some manner.

52. More generally, since the development of the basic TDD system 20 years ago ASCII terminal technology and modem technology have advanced significantly to the point where low cost, personal computers with modems (which can serve as ASCII TDDs) are mass produced consumer items which may have lower cost than traditional TDDs. In addition, packet switching technology has also progressed to the point where it may provide long distance connectivity for typing at a signficantly lower cost than MTS. However, no packet switching provider presently offers end to end services that are appropriate for the TDD user. We also note that if the TDD users were to migrate to the more common ASCII technology they would be able to communicate with millions of such terminals in residences and businesses.

53. Generally available relay services appear to restrict users to intrastate use. In this proceeding several parties, including EIA and SHHH, argue the Commission should defer the matter to private organizations for resolution. Others, including MPC, GRI, NARUC and some private citizens, seek Commission action to create an interstate relay system for TDD users. NARUC points out that as many as 15 states have plans for an intrastate TDD relay system. It urges the Commission to develop a federal policy on interstate relay systems to achieve coordination and consistency in the development of intra-and interstate systems.

54. An effective interstate TDD system has the potential to substantially improve access by the deaf to telecommunications services. The question is what is the most efficient, cost effective way of facilitating one. There are no specific proposals before us at this time. To conduct the sort of cost/benefit analysis Congress intended, we solicit the submission of specific proposals.

55. We believe the current record must be supplemented with data regarding the technical, economic and regulatory parameters for an interstate system. Specific, detailed proposals for an interstate relay system that can be used by all, or most, TDD users, i.e., users with Baudot or ASCII format units must be developed. The proposals should include technical requirements and should indicate what organization would establish standards. Proposals should be offered on ways to foster Baudot-ASCII compatibility. In light of the research and development underway to discover means of implementing an unmanned relay system, each proposal should consider the means of phasing in possible replacement of manned stations with unmanned facilities. We specifically seek comment on the feasibility of developing packet switched services based on new or existing packet switched networks that could provide low cost connectivity for Baudot and ASCII TDD users. In addition, commenters are asked to discuss the roles of all the entities anticipated to be a part of rendering the service, including private organizations currently providing service. The roles of interstate carriers in particular should be addressed.

56. Proposed plans should incorporate an economic assessment of the impact such a system would have on ratepayers. The record suggests that potential users of the system will require a subsidy. The economic analysis should discuss the amount of subsidy, the form it should take, and a cost/benefit study showing the number of persons benefiting and the specific ways they will benefit. Suggested rates for use of the system would further assist the assessment of implementing such a system. Potential users supporting implementation of an interstate relay system are invited to also comment on their anticipated use of an interstate system and features they feel are necessary to enhance their access to their community of interest.

57. Finally, all plans must include proposed regulations applicable to the use and operation of an interstate system. The Commission's ability to mandate an interstate TDD relay system and establish a funding mechanism for it appears to raise new and novel questions of law. Accordingly, we request comment on our statutory authority to mandate and fund such a system.[21] Proposed regulations should include user eligibility requirements, common

carrier responsibilities, details regarding the administrative operation and the organizational structure if the plan envisions a system to be governed by a body other than the provider of the service. Any expected limitations deemed necessary should be highlighted and accompanied with an explanation.

58. *Amplifier Handsets.* As indicated above, both MPC and the GRI Report indicate a need for more amplifier handsets.[22] MPC states that "[a]ugmented volume is needed by a great many mildly and moderately hearing-impaired people as well as those who are severely or profoundly impaired and use the extra amplification to supplement their inductive reception." MPC comments, p. 4. To assist this group of impaired persons, MPC requests a rule modification requiring at least 25 percent of coin- and card-operated telephones to be equipped with an amplifier.

59. We do not have sufficient facts upon which to conduct a cost/benefit analysis, as intended by Congress.[23] Therefore, we seek comment on the following: The size of the population the rule would address, the number of handsets involved, or the total cost to industry to comply with such a regulation, and the type of amplification (speech, hearing or both) necessary to resolve the perceived problems.[24] In addition, the GRI study notes other access problems that would not be remedied by amplifier handsets. These include such things as reaching a handset and the need for push button telephones. We seek comment on whether requiring all interstate pay telephones to be push button would be more beneficial to a greater number of people than requiring amplifier handsets.

60. *Other Issues.* The Gallaudet study raises some particular suggestions for other changes. Twenty four percent of those interviewed suggested improving accessibility of the disabled can be accomplished by lowering placement of public telephones for wheel chair use, Telecommunications Devices for the Deaf in all public places, portable TDD telephones and amplified handsets "everywhere." We ask commenters to address each of these proposals in their further comments. Although the Disabled Act focuses on measures to assist the hearing impaired, a substantial number of commenters address issues of importance to the deaf, speech impaired and other disabled persons. We also seek comment on other appropriate rule changes.

61. For example, analysis of the GRI study raises the question of how often the problems cited occur or whether the hearing impaired are attempting to use "non-essential" telephones because they lack knowledge regarding HAC regulations. Although our current hearing aid compatibility rules have been in effect for nearly four years, SHHH argues there is no general awareness of their existence and intent by the general public, including many members of the hearing impaired community. SHHH suggests that greater efforts be extended by organizations representing the hearing impaired and the Commission to educate the public on this matter. In other words, it appears that it could be a lack of knowledge of the rules by those who must comply with them and those who are designed to benefit from them (and are in the best position to know if they are being observed) that contributes to the rules being less effective than they should be.

62. To further advance access by the hearing impaired to telephone services, we request that commenters consider plans that they believe will achieve greater dissemination of information related to our rules. We also ask them to define what the Commission's role in such activities should be and to include cost estimates for distribution of necessary information. We would be especially interested in knowing of complaints filed with the states alleging noncompliance with the rules. Analysis of such complaints would provide a base from which to determine patterns of noncompliance and could indicate an education program that could target such problems.

63. There is little information on record concerning the hearing aid's role in these matters. It would certainly appear to play an integral role in the way the hearing impaired access telephone service. An assessment of how the quality of the hearing aid relates to the user's ability to access the telephone or use telephone services is required to determine what Commission action is appropriate. Further, it would be helpful to know if efforts are underway to standardize the hearing aid telecoil performance requirements, and the levels being proposed. Also, commenters should consider the need for greater dissemination of information to consumers relating to the hearing aid's usefulness in telephone conversations, the merits of grading hearing aids for telephone use and offer suggestions on how, and by whom, such information can be distributed. If the marketplace for hearing aids is workably competitive, compatibility with telephone use should be an important point of product differentiation. Manufacturers should have incentives to enhance the compatibility of aids with the telephone. In fact, we note the percentage of in-the-ear devices with telecoils has increased (Table 1, *infra).*

ADVISORY COMMITTEE

64. *Comments.* The NOI suggested that the issues that must be addressed to improve disabled persons' access to telecommunications services may be more appropriately handled by a committee comprised of various interested parties. It was suggested that such a committee could operate under the auspices of the Exchange Carriers Standards Association (ECSA) or the EIA. Both of these organizations indicate that these matters may be more suitably addressed by some other organization.

65. Most of the commenters favor the creation of this committee. But many urge that the efforts of the committee not be focused exclusively on the needs of the hearing impaired and the deaf. There are other persons with disabilities that impede their access to telephone services. As noted by GRI, there are issues of like importance for persons with speech, vision and mobility impairments. Some individuals have several disabilities. In addition, technological changes and different governments' actions make these issues even more complex. Many of those favoring the formation of a committee recommend that the Commission establish a Federal Advisory Committee on Telecommunications and the Disabled. Proposed membership should consist of representatives from the telephone industry, disabled consumers, state regulatory commissions, manufacturers of specialized customer premises equipment, audiologists, rehabilitation engineers, and Commission personnel. According to GRI, the committee's functions should include:

> tracking and informing the Commission of developments, including technological advances, that affect access to telecommunications for disabled people; considering and debating policy options; advising on

development of regulations; recommending the creation of ad hoc working groups outside the FCC; [and] defining research needs.

Gallaudet Research Institute Comments, pp. 8-9.

66. According to some proponents, there exist two organizations, Future of Induction Technology (FIT) and Telecommunications for Hearing Impaired Consumers Forum (THIC), that could serve as the nucleus of the proposed committee. Each of these organization's membership is composed of the representatives of interests deemed essential for successful operation. According to SHHH, FIT brings together members of the hearing aid and telephone industries, government, consumers and others to investigate any technology that gives the promise of providing greater accessibility to the consumer. MPC describes THIC as a forum that has met semi-annually for more than a decade for consultative and information exchange purposes. Its membership is similar in composition to FIT. USTA urges that any committee formed should have a defined organizational time frame, a balanced membership and meet the requirements of the Federal Advisory Committee Act, 5 U.S.C.S. Appx. 2.

67. EIA details its involvement in matters leading to services for the hearing impaired and handicapped. However, at this juncture, it does not see the need for the proposed committee. It implies that the Commission's objective could be achieved by merger of FIT and THIC (EIA being an active member of both) on a coequal basis.

68. In their reply comments, NYNEX (New York Telephone Company and New England Telephone and Telegraph Company) oppose the idea of creating a committee under the auspices of ECSA. ECSA, they indicate, does not deal with issues related to the subject matter. Although NYNEX is not opposed to formation of a committee if operated under some other entity, it feels the issues raised are being resolved with consumer premises equipment and normal telephone calls. Therefore, the need for the committee is not that great.

69. PTC concludes that the charter of any committee formed should not include questions regarding pay telephone modifications. However, should such issues be forwarded to a committee, PTC would be a willing participate. Other parties filing replies think the idea has wide support and recommend that the Commission establish a committee.[25]

70. *Analysis*. The commenters generally agree that some sort of committee is appropriate. The comments vary, however, regarding what form that committee should take. Under the Federal Advisory Committee Act, Public Law No. 92-463, (FACA), new advisory committees should be established only when they are determined to be essential and their functions cannot be performed by Commission staff or by an existing committee. We cannot conclude at this time that forming a committee pursuant to FACA is essential. Rather, we believe that it would be more appropriate to seek comments from all interested parties. We note, however, that FIT and THIC are existing groups whose memberships include the type of representation suggested by those commenters supporting establishment of a Commission-sponsored committee. There are indications the FIT and THIC have considered some of the issues pertinent to the disabled's access to telecommunications services and equipment. We encourage these (or other) groups to coordinate the development of consensus proposals to facilitate Commission consideration for further action.

71. As is noted above, NARUC specifically requested that a further NOI be initiated to consider implementation of an interstate TDD system. We have asked that interested parties submit specific proposals in this next stage of our inquiry. As explained above, many details will have to be considered, such as the extent of the need for such a system, the costs of operating it, the financial scheme to make it viable, qualifications for use, regulations pertaining to its operation and the Commission's role.

72. We encourage the parties to discuss the matters raised herein among themselves before comments are filed so that effective and efficient means are identified to enhance access by the disabled to telecommunications equipment and services. To aid in this regard, we are including the mailing addresses of the commenters in this proceeding. Greater interaction among interested parties, such as those participating in this proceeding, is likely to enhance access by the disabled.

CONCLUSION

73. Although it is clear that the disabled do not have the same access to telecommunications equipment and services enjoyed by others in society, identifying effective remedial measures is a difficult matter. Section 610 of the Communications Act and our implementing regulations are an attempt to assist one segment of the disabled -- the hearing impaired. We believe the fairest reading of the Congressional history of Section 610 is that it is a careful balance of a number of competing interests, and that changes in our rules should not be made unless we are confident, on the basis of a careful cost/benefit analysis, that the changes would be effective and efficient. Upon preliminary analysis two proposals --requiring all credit card telephones to be hearing aid compatible and expanding hearing aid compatible workplace telephones to include telephones in common areas the hearing impaired are likely to access in the ordinary course of their employment -- seem to offer benefits that outweigh likely costs. We are unable to make that finding with respect to the various proposals before us on the basis of the comments filed to date. Therefore, we seek further comment on what additional steps are appropriate.

74. Accordingly, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, IT IS ORDERED that a Further Notice of Inquiry and Notice of Proposed Rule Making IS INSTITUTED.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

75. In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601, the Commission issues the following initial regulatory flexibitiy analysis:

A. Action Contemplated and Reason for Action

76. By this NPRM, the Commission seeks to elicit comment on a proposal to change its rules to provide the hearing impaired with greater access to telecommunications services.

B. Objective

77. The objective of this Rule Making is to fulfill the intent of Congress.

C. Legal Basis

78. The legal authority for this action is contained in Sections 1 and 4(i) of the Communications Act, 47 U.S.C. § 151 and 154(i).

D. Description, Potential Impact and Number of Small Entities Affected.

79. The effect of the proposed rules will depend upon whether businesses and manufacturers currently are using hearing aid compatible telephones and what amount of grandfathering they demonstrate is appropriate. The overall economic impact of the proposed rules should be small.

E. Recording, Recordkeeping, and Other Compliance Requirements.

80. No additional burdens anticipated.

F. Federal Rules that Overlap, Duplicate or Conflict with these Proposed Rules

81. None.

G. Any Significant Alternatives to Minimize the Impact on Small Entities.

82. None.

ADMINISTRATIVE MATTERS

83. In accordance with the applicable procedures set forth in Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, interested parties may file comments on or before July 26, 1988, and reply comments on or before September 9, 1988. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file and provided that the Commission's reliance on such information is noted in the Report and Order.

84. Interested parties shall file an original and 5 copies of all comments, replies, or other documents. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally in the Rule Making proceeding may do so by submitting one copy of the comments provided that the docket number is specified in the heading. All filings in this proceeding will be available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

85. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

86. As required by Section 603 of the Regulatory Flexibility Act, we have prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

87. Accordingly, pursuant to the authority contained in Sections 1 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 and 154(i), IT IS PROPOSED that the amendments to Part 68 of the Commission's rules set forth in Appendix A be adopted.

88. The Secretary shall cause a copy of this Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981). The Secretary shall also cause a summary of this Notice to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX A

Section 68.112 is amended by revising current paragraphs (c)(1) and (c)(2) to read as follows:

§ 68.112. Hearing aid-compatibility

*****

(c) Telephones frequently needed by the hearing impaired.

(1) Any telephone for which calls may only be paid for by credit card or other pre-arranged credit.

(2) Any telephone made available at the work station or in common areas used by a hearing impaired employee for use by that employee in his or her employment duty. An employee's "work station" is defined as the location within a workplace where that employee is usually found in the course of his or her employment duties. "Common areas used by a hearing impaired employee" include libraries, reception areas and other similar locations the employee may need to access in the course of his or her employment duties.

*****

APPENDIX B

Parties FIling Comments

Alexander Graham Bell Association for the Deaf
3417 Volta Place
Washington, D.C. 20007-2778

American Speech-Language-Hearing Association
10801 Rockville Pike
Rockville, MD 20850

American Telephone and Telegraph Company
295 North Maple Avenue
Basking Ridge, NJ 07290

Ameritech Operating Companies
30 South Wacker Drive
Chicago, IL 60606

Bell Atlantic Telephone Companies
1710 H Street, N.W.
Washington, DC 20036

Bell South Corporation,
South Central Bell Telephone Company,
and Southern Bell Telephone and
Telegraph Company
4300 Southern Bell Center
675 West Peachtree St., N.E.
Atlanta, GA 30375

Electronic Industries Association,
Information and Telecommunications
Technologies Group, User Premises Equipment
Division
2001 Eye Street, N.W.
Washington, DC 20006

Exchange Carriers Standards Association,
Standards Committee T-1
Bell Communications Research
331 Newman Springs Road
Red Bank, NJ 07701

Gallaudet Research Institute
800 Florida Avenue, N.E.
Washington, DC 20002

Gallaudet University
800 Florida Avenue, N.E.
Washington, DC 20002

GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, DC 20036

Hearing Industries Association
1255 23rd Street, N.W.
Washington, DC 20037

Maryland's People Counsel: Hearing and Speech Agency of Metropolitan Baltimore, Inc.; Maryland Department of Health and Mental Hygiene; Maryland Governor's Commission on Hearing Impairments; Maryland Governor's Office for Handicapped Individuals; National Center for Law and the Deaf; Organization of Use of the Telephone, Inc.; and Telecommunications Exchange for the Deaf, Inc.
American Building, Ninth Floor
231 East Baltimore Street
Baltimore, MD 21202

Mountain States Telephone and
Telegraph Company,
Northwestern Bell Telephone Company,
and Pacific Northwest Bell Telephone Company
1020 19th Street, N.W.
Suite 700
Washington, DC 20036

National Association of Regulatory
Utility Commissioners
1102 ICC Building
P.O. Box 684
Washington, D.C. 20044

New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223

Pacific Bell
444 North Capitol Street, N.W.
Suite 718
Washington, DC 20001

People of the State of California
and the Public Utilities Commission of the
State of California
505 Van Ness Avenue
San Francisco, CA 94102

Public Telephone Council
c/o Pierson, Ball & Dowd
1200 18th Street, N.W.
Washington, DC 20036

Self Help for Hard of Hearing People, Inc.
7800 Wisconsin Avenue
Bethesda, MD 20814

Southwestern Bell Telephone Company
1010 Pine Street, Rm. 2305
St. Louis, MO 63101

United Telephone System Companies
1875 Eye Street, N.W.
Suite 1250
Washington, DC 20006

United States Telephone Association
900 19th Street, N.W.
Suite 800
Washington, DC 20006-2102

U.S. Spring Communications Company
1850 M Street, N.W.
Suite 1110
Washington, DC 20036

Parties Filing Reply Comments
American Telephone & Telegraph Company
Bell Atlantic Telephone Companies
GTE Service Corporation

MCI Telecommunications Corporation
1133 19th Street, N.W.
Washington, DC 20036

Maryland's People Counsel: Hearing and Speech Agency of Metropolitan Baltimore, Inc.; Maryland Department of Health and Mental Hygiene; Maryland Governor's Commission on Hearing Impairments; Maryland Governor's Office for Handicapped Individuals; National Center for Law and the Deaf; Organization of Use of the Telephone, Inc.; and Telecommunications Exchange for the Deaf, Inc.

NYNEX Telephone Companies
(New York Telephone Company and
New England Telephone and Telegraph Company)
120 Bloomingdale Road
White Plains, NY 10605

Pacific Bell
Public Telephone Council
Southwestern Bell Telephone Company

United States Architectural and
Transportation Barriers Compliance Board
330 C Street, S.W.
Washington, DC 20202

FOOTNOTES

[1] Access to Telecommunications Equipment by the Hearing Impaired and Other Disable Persons, *Order*, CC Docket No. 83-427, 49 Fed. Reg. 1352 (January 11, 1984), *modified*, 49 Fed. Reg. 19666 (May 9, 1984), *further modified*, FCC 84-382 (released August 13, 1984), and 47 C.F.R. Part 64, subpart F, Sections 68.4, 68.112, 68.224 and 68.316. The Disabled Act is codified at 47 U.S.C. § 610. The Cable Communications Policy Act of 1984, Public Law No. 98-549, redesignated the Disabled Act as Section 710, but did not add a new Section 610. We will continue to refer to the Disabled Act as Section 610 to be consistent with other references in this Docket.

[2] "Essential Telephones" include only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using hearing aids specially designed for telephone use. 47 U.S.C. § 610(b).

[3] Most external hearing aids have a built-in telephone pick-up, or "telecoil," which is activated by a switch on the hearing aid. When this switch is placed in the "telephone" position, the microphone is turned off and the hearing aid can be used at full volume without feedback and with minimal background noise. These hearing aids are activated by the magnetic field generated by telephone handsets. In-the-ear hearing aids generally rely on audio amplification rather than electromagnetic coupling (and a telecoil) to provide the wearer with telephone access. Unless otherwise indicated, references to hearing aid compatible telephones refer to equipment which is compatible with a telecoil type hearing aid. *See* House Report No. 97-888, 97th Cong. 2d Sess., at p.8 (House Report).

[4] *See* Telecommunications Services for the Deaf and Hearing Impaired, *Notice of Inquiry*, CC Docket No. 78-50, 67 FCC 2d 1602 (1978), *terminated* FCC 83-177 (released May 3, 1983) and CC Docket No. 83-427, note 1, *supra*.

[5] 2 FCC Rcd 2836 (1987); 52 Fed. Reg. 19198 (May 21, 1987).

[6] The House Report accompanying the Disabled Act stated:

> The reported bill does not require all telephones to be compatible with hearing aids. Rather, the bill preserves consumer choice while ensuring that the needs of the hearing impaired are fully served. The legislation focuses on those "essential telephones" to which the hearing impaired must have access if they are to function effectively in modern society. Companies are free to manufacture and to market non-compatible telephones, and businesses and consumers may purchase these instruments for use by persons who do not have hearing impairments.

House Report at p. 9. *See also infra* paras. 20-21.

[7] Comments were received from telephone common carriers, state public utility commissions, equipment manufacturers, organizations representing persons with impaired hearing and other disabilities (Appendix B).

[8] Maryland People's Counsel submitted comments on behalf of itself and the Hearing and Speech Agency of Metropolitan Baltimore, Inc., Maryland Department of Health and Mental Hygiene, Maryland Governor's Commission on Hearing Impairments, Maryland Governor's Office for Handicapped Individuals, National Center for Law and the Deaf, Organization for Use of the Telephone, Inc. and TelecommunicationsExchange for the Deaf, Inc. (hereinafter jointly referred to as MPC).

[9] Final Report, Disabled Consumers: An Exploratory Opinion Survey, Joint TelecommunicationsProject of the Consumer Federation of America, The American Association of Retired Persons and American Telephone and Telegraph, Inc. January 1987 (Report). The Report notes the study "was limited in scope and not intended to be generalizable to the population as a whole. The study examined the opinions of persons from three categories of disabling conditions: hearing impairment [43 interviews], visual impairment [25 interviews], and mobility impairment [33 interviews]". Report, Summary p. 1.

[10] Report at p. 8.

[11] Report at p. 13.

[12] House Report, note 6 *supra*, at p. 9.

[13] "In any Rule Making to implement the provisions of this Section, the Commission shall specifically consider the costs and benefits to all telephone users, including persons with and without hearing impairments. The Commission shall ensure that regulations adopted to implement this Section encourage the use of currently available technology and do not discourage or impair the development of improved technology." Section 610(e) of the Disabled Act.

[14] *See infra* para. 41 et. seq.

[15] The idea of greater dissemination of information to improve hearing impaired access to telephone services is also supported by Gallaudet Research Institute, among others.

[16] Section 610(b) of the Disabled Act reads:

> [T]he Commission shall require that essential telephones provide internal means for effective use with hearing aids that are specifically designed for telephone use. For purposes of this subsection, the term "essential telephones" means only coin-operated telephones, telephones provided for emergency use, and other telephones frequently needed for use by persons using such hearing aids.

[17] United Telephone System Companies state they do not oppose universal hearing aid compatibility after a certain date. In fact, these companies say they have been purchasing and using only hearing aid compatible telephones since 1984. The New York State Department of Public Service supports a universal hearing aid compatibility requirement if the Commission finds the additional manufacturingcost in fact is *de minimus* as claimed by some parties. Alexander Graham Bell Association for the Deaf also supports this idea. It offers this support because it believes there always will be a segment of the hearing impaired population whose hearing deficiency will be such that a telecoil equipped hearing aid will be necessary in order for them to use a telephone.

[18] The term TDD generally refers to a typewriter style device equipped with a message display (screen). This device generates from the keyboard a coded signal corresponding to the typed character. This signal is passed over the telephone network via a voice circuit. Connection to the network generally is implemented through audio coupling via a telephone handset.

[19] A number of telephone companies disclose that they provide an array of devices beyond TDDs designed to assist the disabled to communicate via the telephone. Some of the products available include hands-free speakerphones, amplifier-handsets, artificial larynxes, automatic dialers, different types of signaling devices and special equipment arrangements to meet the needs of mobility impaired individuals. The record shows that a number of states have established programs which provide disabled individuals needed equipment to use the telephone network. In many cases users are given free instructionson using the devices. Users of this equipment either receive the equipment for free or incur a very minimalcharge. Generally, these programs are subsidized through a surcharge levied on ratepayers or local telephone companies.

[20] Manned relay service enables speech or hearing impaired TDD users to communicate with voice telephone users. The service is accessed via telephone by either a TDD or voice telephone user. The caller speaks to or types a call request to a translator who is equipped with a special video display system. Using this equipment, the translator translates the typed or voice message from one medium to the other, and completes the call to the called party. AT&T Comments, p. 11.

[21] *See , e. g.*, Rural Telephone Coalition v. FCC, No. 84-1110, slip op. at 15-19 (D.C. Cir. Feb. 5, 1988).

[22] *See* para. 14, *supra*.

[23] For the same reasons we are unable to find that the other proposals, such as changing technical performance standards will effectively improve access by the hearing impaired. This issue is best left to consensus recommendations by affected parties. *See* further NOI, *infra*.

[24] PTC states that the cost per new amplifier handset is as much as $85.00 and retrofitting existing units would range between $20.00 and $30.00 per telephone. That cost is likely to rise because these units are frequently vandalized.

[25] AT&T, Bell Atlantic Telephone Companies, MPC, GTE, Pacific Bell and Southwestern Bell Telephone Company.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-384

In the Matter of

Amendment of Section 73.202(b),	RM-5223
Table of Allotments,	RM-5476
FM Broadcast Stations.	RM-5667
(Lompoc and Orcutt,[1] California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 4, 1988 ; Released: April 8, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making* (*Notice*) [2] proposing to substitute FM Channel 262B1 for Channel 265A and Channel 281B1 for Channel 224A at Lompoc, California, and to modify the licenses of Stations KRQK-FM (Channel 265A) and KBOX(FM) [3] (Channel 224A) to specify operations on Channels 262B1 and 281B1, respectively. The *Notice* was adopted in response to two petitions for rule making filed (1) by Crystal Broadcasting, Inc. (Crystal),[4] licensee of Station KRQK, and (2) jointly by Golden Coast Broadcasting, Inc. (Gold Coast), licensee of Station KBOX, and Broadcast Management Consultants (BMC), assignee.[5] Crystal, Dorsey Broadcasting, Inc. (Dorsey), BMC and Kyung Whan Son (Son) filed comments. Radio Representatives, Inc. (RRI) filed comments and a counterproposal to allot Channel 239B1 to Orcutt, California.[6]

BACKGROUND

2. Crystal seeks to enhance the facilities of Station KRQK pursuant to the adjacent channel provision set forth in Section 1.420(g)(3) of the Commission's Rules. Because proposed Channel 262B1 is incompatable with Crystal's existing Channel 265A, the Commission will not entertain applications from other parties for Channel 262B1. In contrast, Golden Coast/BMC seeks to enhance the facilities of Station KBOX pursuant to Section 1.420(g)(2). Inasmuch as proposed Channel 281B1 is compatable with existing Channel 224A, competing applications for Channel 281B1 will be entertained absent the availability of another, equivalent channel to accommodate other interested parties. In light of the possibility that other interests in Channel 281B1 would be expressed in response to the *Notice*, Golden Coast/BMC previously suggested in the context of their rule making petition that Channel 239B1 is available to accommodate other interests at Lompoc, In fact, Son's comments consist of an interest in operating a Lompoc station on Channel 281B1. RRI's counterproposal is to allot Channel 239B1 to Orcutt instead of Lompoc.

COMMENTS

3. Dorsey expresses interest in operating a Lompoc station on Channel 239B1. BRI and Crystal reiterate their interests in Channels 281B1 and 262B1, respectively, and Son, as noted, expresses interest in Channel 281B1.

4. RRI supports the proposal set forth in the *Notice* insofar as it merely provides for upgrades of Stations KRQK and KBOX on new Channels 262B1 and 281B1, respectively. However, it argues that it is more appropriate to allot Channel 239B1 to Orcutt and thereby provide for a first FM and second local service there than to allot it to Lompoc, which is already served by five local stations. RRI asserts that it would apply for an authorization to operate an Orcutt facility on Channel 239B1 from which service could also be provided to Lompoc.

5. Subsequent to the comment deadline, Crystal requested that its Station KRQK petition be considered separately from the Station KBOX petition, and BMC requested expedited consideration of its Station KBOX petition.

DISCUSSION

6. The Commission staff conducted an engineering analysis and has determined that Channel 294B1 can be allotted to Lompoc consistent with the distance separation requirements, provided there is a site restriction of 11.3 kilometers (7.0 miles) southwest. Allotment of Channel 294B1 to that community provides an equivalent channel to accommodate other interests in a B1 frequency there and, accordingly, allows for the modification of the authorization of Station KBOX to specify operation on Channel 281B1 pursuant to Section 1.420(g)(2) of the Rules. Such action will also allow for the provision of a new Class B1 service to Orcutt on Channel 239B1, thereby eliminating the necessity to choose between the proposal to allot that channel to Lompoc and the counterproposal to allot it to Orcutt. In light of the above, it is not necessary to consider the requests of Crystal and BMC for separate action and expedited action, respectively.

7. The public interest will be served by allocating Channels 262B1 and 281B1 to Lompoc, thereby enabling the provision of wider area coverage there by Stations KRQK and KBOX. The public interest will also be advanced by allocating Channel 239B1 to Orcutt, thereby allowing for the provision of a second local and first FM service to the community. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), 307(b), and 316(a)(1) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), 0.283, and 1.420(g) of the Commission's Rules, IT IS ORDERED, That effective **May 23, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Lompoc, California	262B1, 281B1, 294B1
Orcutt, California	239B1

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Crystal Broadcasting, Inc. for Station

KRQK-FM, Lompoc, California, IS MODIFIED, effective **May 23, 1988,** to specify operation on Channel 262B1, in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Broadcast Management Consultants for Station KBOX(FM), Lompoc, California, IS MODIFIED, effective **May 23, 1988,** to specify operation on Channel 281B1, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. The window period for filing applications on Channel 239B1 at Orcutt, California, will open on **May 24, 1988**, and close on **June 23, 1988.**

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Joel Rosenberg, Mass Media Bureau, (202) 634-6530. For information related to the window application process, contact The Audio Services Division, FM Branch, (202) 632-6908.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Orcutt has been added to the caption.

[2] 1 FCC Rcd 135 (1986). The *Notice* incorrectly showed Channel 262B1 as an existing Lompoc allotment.

[3] The *Notice* referenced the station as KXCC. The call sign was changed to KBOX(FM) effective November 1, 1986.

[4] Although Sunshine Wireless Co. of California initiated the Station KRQK petition, Crystal became the licensee pursuant to an assignment of license effective March 8, 1986.

[5] The application for assignment of the license of Station KBOX from Golden Coast to BMC (File No. BALH-860716GS) was granted November 28, 1986.

[6] Public Notice of the Orcutt counterproposal was given January 5, 1987, Report No. 1636.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

THEODORE M. JONES — File No. 4768a-CL-P-256-A-86

For authority to construct a nonwireline cellular system in the Charlottesville, Va. MSA

PAULA M. ALOI — File No. 79231-CL-P-271-A-86

For authority to construct a nonwireline cellular system in the Kokomo, Indian MSA

EUNICE E. SINGLETON — File No. 78156-CL-P-278-A-86

For authority to construct a nonwireline cellular system in the Columbia, Missouri MSA

JAMES C. DIAL — File No. 66719-CL-P-280-A-86

For authority to construct a nonwireline cellular system in the Burlington, N. C. MSA

CHARLES N. SMITH, III — File No. 4264a-CL-P-277-A-86

For authority to construct a nonwireline cellular system in the Sheboygan, Wisconsin MSA

ORDER

Adopted: March 29, 1988 ; Released: April 8, 1988

By the Chief, Mobile Services Division:

1. Applications for various cellular markets are pending action before the Commission. On March 18, 1988 Peter T. Lewis (Lewis) filed a Petition for Leave to file and a Contingent Motion for Special Relief concerning allegations raised in these markets.

2. Frank Mirgon,(Mirgon) who filed Petitions to Deny the applications of Theodore M. Jones (tentative selectee in Charlottesville, Va.) and Charles N. Smith (tentative selectee in Sheboygan, Wisconsin) filed a Motion for Extension of Time on March 25, 1988. In its motion Mirgon requests three weeks until April 21,1988 in which to file a response to Lewis' petition. According to Mirgon, the Lewis motion contains so much new matter that it is not possible to prepare a comprehensive response within the time specified for opposition pleadings in section 1.45 of the Commission's Rules (March 31, 1988 is the due date according to the rule). Lewis' counsel consented to an extension of time up to April 4, 1988.

3. We believe good cause has been shown for granting an extension of time for filing a response. However, in the interest of not causing undue delay in these proceedings, we will grant an extension of time up to April 15,1988. Any others interested in filing responses should file them within the time frame established by this order.

4. Accordingly, IT IS ORDERED, that the extension of time filed by Frank Mirgon IS GRANTED. Frank Mirgon has until April 15, 1988 to file its response.

5. This order is issued pursuant to Section 0.291 of the Commission's rules. *See* Sections 1.4(b) and 1.102.

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

MILLEDGEVILLE File No. 23895-CD-P/ML-01-86

MOBILEFONE, INC. File No. 20476-CD-P/ML-01-87

For authority to construct an additional facility in the Public Land Mobile Service for Station KUC919 to operate on frequency 158.70 MHz at Macon, Georgia

ORDER ON RECONSIDERATION

Adopted: March 29, 1988; Released: April 8, 1988

By the Chief, Mobile Services Division:

1. On May 30, 1986, Milledgeville Mobilefone, Inc. (Milledgeville) filed the captioned application (File No. 23895-CD-P/ML-01-86) to operate on 158.70 MHz at Macon, Georgia. On October 20, 1986, the Mobile Services Division (MSD) returned the application as defective for failure to include a complete co-channel showing as required by Section 22.15(b)(1) and (b)(2) of the Commission's rules.[1] Milledgeville filed a Petition for Reconsideration and requested reinstatement of the application *nunc pro tunc*. Milledgeville also resubmitted its application (File No. 20476-CD-P/ML-01-87) with a corrective minor amendment. Quick Call, Inc. (Quick Call)[2] filed an Opposition to Petition for Reconsideration and Milledgeville filed a Reply.

2. Milledgeville argues that it provided a complete co-channel showing which included all the co-channel facilities required by Section 22.15(b)(1) and (2) of the rules. Milledgeville asserts that MSD's finding was due to a typographical error in the North Latitude coordinates provided in FCC Form 401, Schedule B, Item 27(b), which read *35* -53-39 instead of *32* -53-39. Milledgeville states that all other references to the coordinates, which appeared in the engineering exhibit, were correct. Milledgeville also states that it gave a correct narrative description of the site location in response to Item 27(a) of Form 401, Scheduel B. Milledgeville notes that under Section 22.23(g)(5) of the rules, typographical errors which are clearly demonstrated to be mistakes by reference to other parts of the application, can be corrected by a minor amendment. Milledgeville argues that by analogy, the error in its coordinates should also be considered minor and correctible.

3. In response, Quick Call argues that an error in the geographic coordinates renders Milledgeville's application blatantly defective. Furthermore, Quick Call states the cut-off date has passed, and that under *Allen C. Moore d/b/a Moore's Service*, 86 FCC 2d 787, 795 (1981) Milledgeville cannot now file a corrective amendment or have its application reinstated *nunc pro tunc*. Finally, Quick Call argues that Section 22.23(g)(5) is inapplicable since *Moore* holds that the time for filing corrective amendments has passed.

DISCUSSION

4. *Moore* states that after an application is returned as defective and the cut-off date has passed, [3] corrective amendments will not be acccepted, and the Commission will not reinstate the application *nunc pro tunc*. 787 FCC 2d at 795. However, we have recognized the existence of a clerical error exception to the *Moore* rule. *See RAM Mobile Communications of Colorado, Inc.*, 2 FCC Rcd 86,87 (1987); *William G. Bowles d/b/a Mid-Missouri Mobilfone*, Mimeo No. 6385, released August 19, 1986. *See also Continental Telephone Company of Illinois*, Mimeo No. 4166, released May 21, 1982. Milledgeville's application contains an extremely minor typographical error which involves the mis-typing of a single digit. The correct information was provided elsewhere in the application in a form in which it could easily have been seen and used by the Commission staff during routine processing. Furthermore, the application was complete and accurate in all other respects. Under these circumstances we find it appropriate to apply the clerical error exception referred to in *RAM* and *Mid-Missouri Mobilfone*. Accordingly, we will grant Milledgeville's Petition for Reconsideration and reinstate the application, as amended, *nunc pro tunc*.[4] However, we note that the clerical error exception is a narrow exception to the *Moore* rule, and will be applied only in unusual circumstances. *See Continental Telephone, supra.* We will continue to adhere strictly to *Moore* in cases where the applicant has failed to submit the required information. *Continental Telephone, supra. See also Mid-Missouri Mobilfone, supra.*

ORDERING PARAGRAPHS

5. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Milledgeville Mobilefone, Inc. is GRANTED.

6. IT IS FURTHER ORDERED, that Milledgeville's application, File No. 23895-CD-P/ML-01-86 is ACCEPTED AS AMENDED NUNC PRO TUNC, and that Milledgeville's application File No. 20476-CD-P/ML-01-87, is DISMISSED.

7. IT IS FURTHER ORDERED that a lottery between Milledgeville's application File No. 23895-CD-P/ML-01-86, and Quick Call's application, File No. 22617-CD-P/L-01-86, shall be held at a time and place to be specified in a subsequent public notice.

8. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division

Common Carrier Bureau

FOOTNOTES

[1] The MSD stated that Milledgeville failed to include stations KLF611 and KPD969 in the co-channel showing.

[2] Quick Call filed a mutually exclusive application (File No. 22617-CD-P/L- 01-86) on March 11, 1986, and submitted a major amendment which appeared on public notice on June 11, 1986. Milledgeville has filed a petition to deny Quick Call's application. Quick Call has filed petitions to deny against each of the captioned Milledgeville applications.

[3] In the precent case, the cut-off date was August 11, 1986, sixty days after the June 11, 1986 public notice announcing Quick Call's major amendment. See Section 22.31(b) of the Commission's rules.

[4] Milledgeville's reinstated application will be included with Quick Call's application in a lottery which will be announced in a future public notice. Under Section 1.823(b) of the Commission's rules, petitions to deny filed against applications for authority in the Public Land Mobile Service will not be reviewed prior to conducting the random selection.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-130

In the Matter of

Amendment of Section 73.202(b), RM-6195
Table of Allotments,
FM Broadcast Stations.
(Old Forge, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 7, 1988; Released: April 8, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Ross Broadcasting Company (petitioner) requesting the allocation of Channel 290A to Old Forge, New York, as the community's second local FM service.[1] Petitioner states that it will apply for the channel, if allocated.

2. Channel 290A can be allocated to Old Forge in compliance with the Commission's minimum distance separation requirements. However, this allotment is mutually exclusive with the pending proposal to allocate Channel 290B1 to Star Lake, New York (MM Docket 87-502, adopted October 30, 1987). Therefore, in order to avoid the conflict, the staff performed a channel search and found that Channel 231A could be allocated instead. Thus, we are substituting Channel 231A for consideration herein.

3. Channel 231A can be allocated to Old Forge in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Canadian concurrence in the allotment is required since Old Forge is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. We believe the public interest would be served by proposing the allocation of Channel 231A to Old Forge, New York, since an interest in its use has been expressed. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Old Forge, New York	--	231A, 259A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 31, 1988,** and reply comments on or before **June 15, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald E. Ross
Ross Broadcasting Company
Box 260
Old Forge, New York 13420
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and. if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The Commission also has pending the Notice of Proposed Rule Making issued at the request of George W. Kimble to allocate Channel 259A to Old Forge, New York, as the community's first local FM service. *See* MM Docket 87-501, adopted October 30, 1987.

[2] The coordinates for Channel 231A at Old Forge are: North Latitude 43°, 42', 42", West Longitude 74°, 58', 24".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-131

In the Matter of

Amendment of Section 73.202(b),	RM-5849
Table of Allotments,	RM-5949
FM Broadcast Stations.	
(Mason City and Iowa City, Iowa)	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 4, 1988 ; Released: April 8; 1988

By the Deput Chief, Policy and Rules Division:

1. The Commission has before it for consideration the petition for rule making filed by B-Y Communications, Inc. (B-Y) requesting the substitution of Channel 230C1 for Channel 228A at Mason City, Iowa, and the modification of its license for Station KNIQ to specify the higher powered channel (RM-5849).[1] Also before us is the request of KRNA, Inc. (KRNA), seeking the substitution of Channel 231C1 for Channel 230C1 at Iowa City, Iowa, and the modification of its license for Station KRNA(FM) to specify the adjacent channel (RM-5949). These two petitions are being considered together since the Mason City request is contingent upon Station KRNA(FM) being modified to specify operation on Channel 231C1. Mason City and Iowa City are located approximately 198 kilometers apart while the Commission's Rules stipulate a 245 kilometer separation between co-channel Class C1 allotments and 170 kilometers between first adjacent Class C1 allotments.

2. B-Y states that the proposed Mason City channel substitution would serve the public interest by allowing it to greatly increase the predicted area of coverage within its 60 dBu contour. This would allow improved service to the communities of Hampton, Charles City, Northwood, Britt and Belmond, Iowa, as well as to a large area south of Mason City. It notes that these areas are subject to tornadoes and other severe weather conditions and thus contends that a particular benefit of the requested increase in facilities arises from the fact that Station KNIQ and its co-owned Station KGLO(AM) are the only stations in north central Iowa with weather radar capabilities. B-Y states that it will promptly apply for a construction permit to upgrade its facilities, if Station KNIQ's license is modified herein.

3. KRNA currently operates on Channel 230C1 at Iowa City. It states that the station's transmitter is restricted to an area approximately 16 miles southwest of Iowa City. KRNA submits that the substitution of Channel 231C1 could enable it to relocate its transmitter to a more favorable site and thus improve service to its community of license while also providing new service to areas on the periphery of Iowa City. KRNA states that it will promptly seek to improve its transmitter location if the channel substitution is granted.

4. Our review of the proposals shows that Channel 230C1 can be allocated to Mason City in compliance with the Commission's minimum distance separation requirements, and can be used at Station KNIQ's present transmitter site, contingent upon the allocation of Channel 231C1 at Iowa City.[2] Channel 231C1 can be substituted for Channel 230C1 at Iowa City in compliance with the Commission's mminimum distance separation requirements with a site restriction of 7.4 kilometers (4.6 miles) southeast. [3]

5. As requested, we shall also propose to modify the licenses of Station KNIQ at Mason City to specify Channel 230C1 in lieu of its present Channel 228A and Station KRNA(FM) at Iowa City to specify Channel 231C1 in lieu of its present Channel 230C1. In accordance with the procedures set forth in Section 1.420(g) of the Commission's Rules, B-Y will not be required to demonstrate the availability of an additional equivalent channel for use by other interested parties and the Commission will not accept competing expressions of interest in use of the higher powered channel. The provisions of Section 1.420(g) do not apply to the substitution at Iowa City since KRNA does not contemplate any increase in its facilities.

6. We believe the public interest would be served by proposing the substitution of Channel 230C1 for Channel 228A at Mason City since it could provide the Mason City area with expanded radio service. We believe the public interest would also be served by substituting Channel 231C1 for Channel 230C1 at Iowa City since it could enable Station KRNA to provide improved service to its community of license and the surrounding area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Iowa City, Iowa	230C1, 264C1	231C1, 264C1
Mason City, Iowa	228A, 252A, 291C1	230C1, 242A, 291C1

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **May 31, 1988,** and reply comments on or before **June 15, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Michael D. Basile, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(Counsel to KRNA, Inc.)

Jonathan D. Blake, Esq.
Neil K. Roman, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(Counsel to B-Y Communications)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] B-Y originally sought the substitution of Channel 231C2 for its Class A channel. However, this request was modified in order to eliminate a conflict with the request of KRNA, Inc. to substitute Channel 231C1 for its Channel 230C1 at Iowa City.

[2] The coordinates for Mason City are: North Latitude 43°, 08', 50"; West Longitude 93°, 14', 39".

[3] The coordinates for Iowa City are: North Latitude 41°, 37', 23"; West Longitude 91°, 27', 48".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-132

In the Matter of

Amendment of Section 73.202(b), RM-6016
Table of Allotments,
FM Broadcast Stations.
(Fort Mohave, Arizona)

NOTICEOF PROPOSED RULE MAKING

Adopted: March 4, 1988 **Released: April 8, 1988**

By the Deputy Chief, Policy and Rules Division:

1. Ft. Mohave Broadcasting (petitioner), has filed a petition for rule making seeking the allotment of Channel 296C2 to Fort Mohave, Arizona, as its first local broadcast service. Petitioner has failed to indicate that it will apply for the channel, as required by Commission policy, and should do so in its comments herein. Failure to respond accordingly may lead to a dismissal of the proposal.

2. At the outset, we note that we could not locate reference coordinates for Fort Mohave in the National Atlas Index. Therefore, in order to determine whether the proposal could comply with Section 73.207(b) of the Commission's Rules, a staff engineering study was performed, utilizing the reference coordinates supplied by petitioner.[1] As a result, the proposal appears to comply with the minimum distance separation requirements of that Rule. However, since we are unaware of the official boundaries for Fort Mohave, there is no assurance that the requirements of Section 73.315 of the Commission's Rules regarding coverage of the proposed service area could be met. *See , Naples, FL*, 41 RR 2d 1549 (1977).

3. Moreover, it was discovered that Fort Mohave is not listed in the U.S. Census as a census designated place "CDP". According to that source, the Fort Mohave Indian Reservation is reported as located in the tri-state areas of Arizona, California and Nevada, and comprises a total population of 219 individuals, of which 183 reside in the Arizona portion.

4. Section 307(b) of the Communications Act of 1934, as amended, requires that channel allotments be distributed fairly, efficiently and equitably " . . . among the several States and communities." Communities are defined by the Commission as geographically, identifiable population groupings. As a general rule, if a community is incorported or listed in the U.S. Census, that is sufficient to satisfy its status. In the absence of such factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic or cultural indicia to qualify it as a "community" for allotments purposes. *See , e. g., Ansley, AL*, 46 FR 58688, December 3, 1981; *Cascade Village, CO*, 48 FR 19917, May 3, 1983; *Red Rock, GA*, 48 FR 36170, August 9, 1983, and cases cited therein.

5. On the basis of the above, we believe the public interest would be served by seeking comments on the proposed allotment of a first FM channel to Fort Mohave, Arizona. Therefore, petitioner or any other interested parties should submit information addressing the concerns raised herein regarding the ability of the proposal to provide city grade coverage, site availability, and submit sufficient information to demonstrate whether Fort Mohave has any business, social organizations or governmental units that identify themselves therewith to support a finding that it is a community for allotment purposes.

6. Accordingly, we shall propose to amend the FM Table of Allotments, Section 73.207(b) of the Commission's Rules, with regard to Fort Mohave, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Fort Mohave, Arizona	–	296C2

7. If Fort Mohave is ultimately found to qualify as a community, it will also be necessary to obtain concurrence of the Mexican Government since it is located within 320 kilometers (199 miles) of the U.S.-Mexico border.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **May 31, 1988,** and reply comments on or before **June 15, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Ft. Mohave Broadcasting
P.O. Box 8073
Fort Mohave, AZ 86427

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who

filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates provided by petitioner are: 34-54-30; 114-35-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-134

In re Applications of

Thaddeus Bishop d/b/a FROGGY BOTTOM TELEVISION	File No. BPCT-861216IV
FREEMAN BORNTREGER	File No. BPCT-870317KO
Charles A. Wright d/b/a AW BROADCASTING	File No. BPCT-870317KP

For Construction Permit
Danville, Virginia

HEARING DESIGNATION ORDER

Adopted: March 17, 1988; Released: April 8, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications of Thaddeus Bishop d/b/a Froggy Bottom Television (Bishop), Freeman Borntreger (Borntreger), and AW Broadcasting (AW) for authority to construct a new television station on Channel 44, Danville, Virginia.

2. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. Bishop and Borntreger have not submitted such an exhibit. Accordingly, each applicant must submit an amendment which contains the requisite exhibit to the presiding Administrative Law Judge within 30 days after this Order is released.

3. The coverage areas proposed by the applicants differ significantly. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. No determination has been reached that the tower height and location proposed by Bishop and AW each would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

5. Bishop's proposed antenna is to be mounted on the existing tower of Station WVOV(AM), Danville, Virginia. Therefore, in order to insure that the AM station's radiation pattern will not be adversely affected, a grant of this application will be appropriately conditioned.

6. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Thaddeus Bishop d/b/a Froggy Bottom Television and AW Broadcasting, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

9. IT IS FURTHER ORDERED, That Thaddeus Bishop and Freeman Borntreger shall each submit an amendment which contains the exhibit required by Section IV, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

10. IT IS FURTHER ORDERED, That, in the event of a grant of the application of Thaddeus Bishop d/b/a Froggy Bottom Television, it will be conditioned as follows:

During installation of the antenna authorized herein, AM Station WVOV, Danville, Virginia, shall determine operating power by the indirect method. Upon completion of the installation, antenna impedance measurements on the AM antenna shall be made and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission (along with tower sketch of the installation) in an application for the AM station to return to the direct method of power determination.

11. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing

and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-120

In re Applications of

WADE AXELL (hereafter: Axell)	File No. BPH-851030MG
ERIC R. HILDING (hereafter: Hilding)	File No. BPH-851030MH
BERNADITA PAULINO SAN NICOLAS - OBENAUF (hereafter: Obenauf)	File No. BPH-851030MI

For a Construction Permit
for a New FM Station
on Channel 257A
in Grass Valley, California

HEARING DESIGNATION ORDER

Adopted: March 11, 1988; Released: April 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

INDIVIDUAL APPLICANTS

2. *Axell.* 47 C.F.R. § 1.65 requires applicants to timely amend their applications so as to keep them substantially complete and accurate with respect to broadcast interests acquired subsequent to the initial filing. Axell filed two such amendments. However, staff review of the Commission's ownership files reveals the existence of errors and misstatements within these amendments such that they cannot be considered to have accurately updated Axell's application.[2] Further, Axell has not reported two changes in ownership which occurred since the filing of the instant application. Commission records show the assignment of KSAY(FM), Fort Bragg, CA, from Axell Broadcasting to Wade Axell on September 22, 1987 (File No. BAPH-870327GX) and the dismissal on January 26, 1988 of Wade Axell's application for Twentynine Palms, CA (File No. BPH-870311MA). Therefore, Axell will be ordered to file an amendment within 30 days of the date of this Order with the presiding Administrative Law Judge accurately updating its application with respect to all broadcast interests, or an appropriate issue will be specified by the Judge.

3. *Hilding.* The material submitted by Hilding does not demonstrate his financial qualifications. Accordingly, an issue will be specified concerning the following deficiency: Answer of "no" to Items 1 and 2, Section III, Form 301 (April 1985), certifying that he does not possess the financial resources to construct and operate the station.

OTHER MATTERS

4. *Late - Filed Amendments.* The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS
Axell	June 29, 1987; October 20, 1986; November 20, 1988
Hilding	June 4, 1986; March 3, 1987; May 28, 1987; July 29, 1987; January 27, 1988
Obenauf	March 19, 1986 (engineering); June 25, 1986; January 13, 1988

5. *Air Hazard.* Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the following applicant would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding. *APPLICANT* : Obenauf

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Hilding, in light of the evidence adduced concerning the deficiency set forth in paragraph 3 above, is financially qualified.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation. *APPLICANT* : Obenauf

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Axell shall be ordered to file an amendment within 30 days of the date of this Order with the presiding Administrative Law Judge updating its application with respect to all broadcast interests.

9. IT IS FURTHER ORDERED, that the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein. *APPLICANTS* : Axell, Hilding, Obenauf

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **April 29, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Applications were also filed by Lynda Straus (File No. ARN-851030MJ) and David R. Hall (File No. ARN-851029MD). However, both applications were returned on August 8, 1987, prior to designation. Neither applicant has filed a timely petition for reconsideration.

[2] Axell's October 20, 1986 amendment reports the grant of Axell Broadcasting's application for Fort Bragg, CA (File No. BPH-850712MH); Commission records show this was not granted until December 17, 1986, two months later. Axell's June 29, 1987 amendment reports the dismissal of Axell Broadcasting's application for Central Valley, CA, which it lists as File No. BPH-851115MN; Commission records show the file number as BPH-850712MN and that, while a motion to dismiss the application (designated for hearing in MM Docket No. 87-123 on April 24, 1987) was filed on June 17, 1987, the application was not dismissed by Judge Edward Luten until October 6, 1987. *See Order*, FCC 87M-2508, released October 8, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-137

In re applications

ROY E. HENDERSON d/b/a PUEBLO RADIO BROADCASTING SERVICE (hereafter Pueblo)	File No. BPH-861002TA
SANCHEZ COMMUNICATIONS, INC. (hereafter Sanchez)	File No. BPH-861002TB
HOMERO S. PACHECO (hereafter Pacheco)	File No. BPH-861002TC
WILLIAM N. FREEMAN (hereafter Freeman)	File No. BPH-861002TD
HAL S. WIDSTEN (hereafter Widsten)	File No. BPH-861002TE
CLASSIC MEDIA, INC. (hereafter Classic)	File No. BPH-861002TF
BUENA SUERTE BROADCASTING CORP. (hereafter Buena Suerte)	File No. BPH-861002TG
O - V COMMUNICATIONS (hereafter O-V)	File No. BPH-861002TH

For a New FM Station
On Channel 248A
In Oro Valley, Arizona

HEARING DESIGNATION ORDER

Adopted: March 11, 1988; Released: April 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Classic*. Classic proposes to co-locate on an existing AM tower, but fails to indicate whether or not the site is presently fenced or, if so, at what distance. Engineering study indicates that this proposal may significantly exceed the ANSI c95.1-1982 exposure guidelines for human exposue to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Classic may have failed to comply with the newly revised rules environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Classic's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Classic will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

3. *Buena Suerte*. In response to Section VI of FCC form 301, Buena Suerte has indicated that it will employ five or more full-time employees. Therefore, it is required to submit the five point Model Equal Employment Opportunity (EEO) Program (FCC Form 396A). The guidelines to the Model EEO Program, Paragraph IV, instruct the applicant to specify the "sources and other techniques it proposes to use to attract minority and female job applicants." Buena Suerte lists organizations which are primarily only women's organizations and fails to include any sources for attracting other minority groups. Buena Suerte will therefore be ordered to amend its application to include minority recruitment sources and recruitment techniques.

4. *O - V*. On December 31, 1987, O-V amended its application to inform the Commission that limited partner Jay S. Zucker has become president of Lemmon Rock Communications, Inc. (Lemmon Rock). O-V has, however, failed to state any broadcast holdings of Lemmon Rock. O-V will therefore be ordered to disclose all communication licenses, permits, applications and any other communications interests held by Lemmon Rock. The presiding Administrative Law Judge will specify any issue necessary from such disclosure.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICNAT	AMENDMENT FILED
Widsten	January 15, 1988
O-V	December 31, 1987
Pacheco	February 19, 1988

6. *Other Matters*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Classic in which it is concluded that the proposed facility is likly to have an adverse effect on the quality of the environment, to determie whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, Classic shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That Buena Suerte shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amendment to its Model EEO Program specifying recruitment sources and techniques to be used to attract minority employees other than females.

11. IT IS FURTHER ORDERED, That O-V shall file within 30 days of the release of this Order an amendment disclosing any communication holdings of Lemmon Rock with the presiding Administrative Law Judge.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: O-V, Widsten, Pacheco.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **April 29, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GTE MOBILNET OF TAMPA INCORPORATED — File No. 29726-CL-MP-86

For modification of Stations KNKA227 and KNKA383 and to combine the CGSAs for Tampa and Lakeland-Winter Haven, Florida MSAs

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 1988; Released: April 8, 1988

By the Chief, Mobile Services Division:

1. GTE Mobilnet of Tampa Incorporated (Mobilnet) proposes to expand, reconfigure and combine the Tampa, Florida Cellular Geographic Service Area (CGSA) and the Lakeland-Winter Haven, Florida CGSA. The expanded CGSAs proposed by Mobilnet will be coterminous with the respective Metropolitan Statistical Areas (MSAs) of Tampa and Lakeland-Winter Haven, Florida. Bayfone of Tampa (Bayfone), the non-wireline cellular licensee for the Tampa, Florida Metropolitan Statistical Area (MSA), and Lakeland Cellular Telephone Company (Lakeland), the non-wireline cellular licensee for the Lakeland-Winter Haven, Florida MSA, have filed a "Petition to Dismiss or Deny or to Condition Authorization" against the captioned application. Mobilnet has filed an opposition pleading to which the petitioners have filed a reply.

2. Bayfone and Lakeland argue that Mobilnet has not demonstrated its financial ability to construct and operate its proposed facilities. In its initial application, Mobilnet estimated its construction and operation costs at $333,736 and relied upon its balance sheet to demonstrate its financial qualifications. The petitioners claim that Mobilnet's balance sheet does not show sufficient net liquid assets to finance its proposal. After the filing of the referenced petition, Mobilnet changed its financial plan by filing a firm commitment letter in which GTE Finance Corporation agrees to provide $350,000 to meet Mobilnet's construction and operation costs. GTE Finance Corporation's balance sheet demonstrates its ability to make the loan under the Commission's "total assets" test, *i. e.*, that GTE Finance Corporation has total net assets in excess of 14 times the amount of its loan commitment to Mobilnet. *See American Cellular Corp.*, 103 F.C.C. 2d 26, 30-31 (1986). Thus, Mobilnet's current financial plan has rendered the petitioners' objections moot.

3. In its application, Mobilnet requests that it be allowed to have a single system identification (SID)[1] number for its combined Tampa and Lakeland-Winter Haven, Florida CGSAs. Although the petitioners have no objection to the request, Bayfone would like assurances that the common SID number will not affect its agreement with Mobilnet by which Bayfone can resell Mobilnet's service using transferable telephone numbers and Lakeland would like assurances that the common SID number will not affect its ability to obtain a transferable number agreement with Mobilnet. In this light, the petitioners request that any authorization issued to Mobilnet permitting it to combine the Tampa and Lakeland-Winter Haven CGSAs be conditioned to state that, pending the commencement of non-wireline serice in Tampa and Lakeland, Mobilnet may not deny resale by the non-wireline carrier, including allowing the non-wireline carrier to use transferable telephone numbers. The petitioners are also concerned that a common SID number for Mobilnet could affect roamer service to their customers outside of their respective CGSAs. Therefore, the petitioners request that any Commission authorization issued to Mobilnet permitting it to combine its Tampa and Lakeland CGSAs be conditioned to state that Mobilnet may not deny roamer service to customers of either the Tampa or Lakeland non-wireline systems.

4. We observe that since Bayfone and Lakeland filed their petition in this proceeding, they have commenced service in Tampa and Lakeland-Winter Haven, Florida. Thus, their concerns about reselling Mobilnet's cellular services are now moot. Further, it appears that the potential problems raised by the petitioners regarding resale and roamer arrangements with Mobilnet are based on mere speculation of harm rather than upon reasonable expectation of actual harm. Mobilnet has expressed its willingness to enter into good faith negotiations concerning these matters and the petitioners have not presented any evidence of bad faith on Mobilnet's part. If Mobilnet has failed to enter into appropriate resale agreements or should fail to enter roamer agreements with either of the petitioners, that petitioner may file a formal complaint with the Commission requesting relief under Section 208 of the Communcations Act of 1934, as amended. Thus, the Commission has stated that a wireline licensee must "provide system capacity to non-affiliated retailers or resellers on a non-discriminatory basis and on the same terms and conditions as [to] its own distribution arm." *Cellular Communications Systems*, 86 F.C.C. 2d 469 at 511. In conclusion, the pleadings do not provide any basis for conditioning the grant of Mobilnet's application in the manner requested by the petitioners.

5. The petitioners also argue that if Mobilnet is allowed to consolidate the two CGSAs, it will most likely operate both systems from one switch located in Tampa. In that event, the GTE telephone company in Lakeland would not be providing the local wireline system with interconnection. Further, assuming the foregoing facts, the petitioners claim that there is a possibility that the local GTE telephone company would give Mobilnet an unfair competitive advantage by denying reasonable requests by the petitioners for interconnection, on the basis that the local GTE telephone company did not provide interconnection to the wireline carrier. Therefore, the petitioners request that the Commission condition any grant of the captioned application to state that the local GTE telephone company in Lakeland and Tampa must promptly accommodate any reasonable request for interconection by the non-wireline cellular companies serving the Tampa and Lakeland-Winter Haven MSAs. Mobilnet opposes the foregoing request, stating that since its affiliate, General Telephone Company of Florida, is not controlled by Mobilnet and is not a party to this proceeding, such a condition would be improper.

6. We do not perceive any reason to condition the grant of Mobilnet's application in the manner requested by the petitioners. Mobilnet, not the local telephone company, is the applicant. Therefore, it would be inappropriate to condition Mobilnet's grant upon the completion of certain actions by a separate business entity. In this regard, the petitions have produced no evidence that the local telephone company is likely to discriminate against them. Any refusal by the local telephone company to provide interconnection would clearly be improper and the petitioners could file a complaint with the Commission pursuant to Section 208 of the Communications Act of 1934, as amended. The Commission has stated that it expects all telephone companies to furnish appropriate interconnection to cellular systems upon reasonable demand and upon terms no less favorable than those offered to the cellular systems of affiliated entities or independent telephone companies. *Cellular Communications Systems*, 86 F.C.C.2d 469, 496 (1981). It is clear that a landline telephone carrier must provide interconnection to a non-wireline cellular carrier, whether or not the landline carrier is already providing service to a wireline cellular carrier in the same market. *See* , *e. g.*, the Commission's Declaratory Ruling concerning the interconnection of cellular carriers to landline carriers in *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2910 (1987).

7. When a cellular licensee wishes to extend its 39 dBu contour beyond the boundaries of its present CGSA, it must file a Form 401 with the Commission and the application cannot be granted prior to the expiration of a 30-day period after it has been placed on public notice, pursuant to Section 309(b) of the Communications Act of 1934, as amended. Once the captioned application to combine its Tampa and Lakeland CGSAs is granted, Mobilnet will be able to add or modify cells whose 39 dBu contours do not extend beyond the newly authorized CGSA and merely inform the Commission of these actions by filing relevant FCC Forms 489s, thus expediting the procedure for adding new cells. The petitioners have no objection to Mobilnet being able to add cells by way of filing FCC Form 489s, but they do not want Mobilnet to obtain a competitive advantage over them . Currently, they must file Form 401s seeking Commission approval for changes which Mobilnet can effectuate without obtaining prior Commission approval. In order to achieve competitive parity with Mobilnet, the petitioners propose that the Commission adopt a procedure by which each of them would be allowed to add or modify overlapping cells by filing a Form 489 notification with the Commission and including with that form a letter from the other carrier agreeing to the addition or modification.

8. We shall not adopt the new procedure recommended by the petitioners. Nevertheless, our procedures already provide that if the petitioners file a request to combine their CGSAs and that request is granted, either petitioner can file a Form 489 notification which explains that it is adding or modifying a cell whose 39 dBu contour does not extend beyond the combined CGSA. In this light, the petitioners could enjoy the same benefits as Mobilnet will enjoy once the instant application to make changes and combine CGSAs is granted.

9. We find that Mobilnet is fully qualified to effectuate the proposals in the instant application and that granting its application will serve the public interest, convenience and necessity.

10. Accordingly, IT IS ORDERED, That the application (File No. 29726-CL-MP-86) filed by GTE Mobilnet of Tampa Incorporated IS GRANTED.

11. IT IS FURTHERED ORDERED, that the Petition to Dismiss or Deny or to Condition Authorization filed by Bayfone of Tampa and Lakeland Cellular Telephone Company IS DENIED.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] The Commission has assigned SID numbers to each cellular system in the top 306 MSAs. The mobile units of each cellular licensee are programmed with the SID number of its "home" cellular licensee so that whenever the customer uses his mobile telephone, the base station in the CGSA where he is driving is automatically notified of that number. Thus, the SID number informs a cellular licensee as to whether the mobile customer is a local customer or a "roamer," *i. e.*, a customer from another service area.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-119

In re Applications of

TRAX BROADCASTING (hereafter Trax)	File No. BPH-870629NE
SILVER SPRINGS COMMUNICATIONS (hereafter SSC)	File No. BPH-870630MS
A.P. WALTER, JR. (hereafter Walter)	File No. BPH-870630MU
SILVER SPRINGS RADIO COMMUNICATIONS, LTD. (hereafter Limited)	File No. BPH-870630MW
SILVER RADIO PARTNERS (hereafter Partners)	File No. BPH-870630MX
SILVER SPRINGS BROADCASTING, INC. (hereafter SSBI)	File No. BPH-870630MY
JIM JOHNSON (hereafter Johnson)	File No. BPH-870630MZ
MARK L. WODLINGER (hereafter Wodlinger)	File No. BPH-870630NC
SILVER SPRINGS - OCALA BROADCASTING, INC. (hereafter SS-O)	File No. BPH-870630NE
OCALA RADIO, INC. (hereafter ORI)	File No. BPH-870630NG
OBN COAST COMMUNICATIONS LIMITED PARTNERSHIP (hereafter Sun)	File No. BPH-870630NH
ROSALIA BIANCO (hereafter Bianco)	File No. BPH-870629MY (PREVIOUSLY DISMISSED)

For Construction Permit for a New
FM station on Channel 238A (95.5 MHz)
in Silver Springs, Florida

HEARING DESIGNATION ORDER

Adopted: March 11, 1988; Released: April 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary matters.* On June 29, 1987, Bianco submitted an application to serve Silver Springs, Florida, on Channel 238A. That application was returned by staff letter (reference 8920-GJB) on December 11, 1987, as unacceptable for filing for inconsistently specifying the geographical coordinates of its proposed antenna site. Specifically, the West longitude coordinates provided in Section V-B, Item 2 of Bianco's application (81o 56o 22) did not agree with the West longitude coordinates plotted on her attached topographic site map (81o 50o 19), thus making it impossible to determine from the face of the application whether her proposal was in compliance with the Commission's rules.

3. On January 11, 1988, Bianco filed a petition for reconsideration (petition) of this action stating that the inconsistency of coordinates resulted from a typographical error which did not prevent the staff from accurately determining the correct coordinates from the four corners of the application.[2] We disagree. The discrepancy in coordinates would force the staff to choose one of the values or to request clarification by amendment from the applicant. We note, however, that Bianco had ample opportunity to examine her application and to correct the discrepancy by filing a perfecting amendment during the 30-day amendment period accorded the applicants pursuant to 47 C.F.R. § 73.3522(a)(6). Therefore, to permit Bianco to clarify and resolve the discrepancy subsequent to the amendment period would force the staff to temporize with a flawed proposal, thus disserving the public and other applicants that have timely amended and perfected applications on file by significantly delaying the initiation of new service. *See , e. g., Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n.7 (1985).

4. Further, in its *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985), the Commission adopted a "hard look" procedure for the processing of FM applications. However, the *Report and Order* made no substantive change in existing policy governing acceptability of applications as defined in 47 C.F.R. § 73.3566(a) which states, in pertinent part, that applications "patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will not be accepted for filing." In the present case, the inconsistency in West longitude coordinates made it impossible, *inter alia*, to determine the veracity of the site availability certification, the environmental impact response, or the information submitted for Federal Aviation Administration (FAA) approval thus preventing a determination of acceptability and rendering the

application not substantially complete. *See also Report and Order*, 50 Fed. Reg. at 19,945 (Appendix D). Accordingly, Bianco's petition for reconsideration will be denied and her application will be dismissed. [3]

5. *Partners*. In response to Section II, Item 7 of FCC Form 301 (1986 ed.), Partners reported that its general partner, Robert A. Bednarek, has an ownership interest in Gator Broadcasting Limited Partnership, permittee of WGBZ(TV), Gainesville, Florida, and that he will divest this interest should Partners' application be granted. A condition reflecting this commitment will be specified below.

6. *Johnson*. In his December 11, 1987 amendment, Johnson reported that he has an ownership interest in West Florida Television, Limited, a limited partnership which is an applicant for a new television station at Inverness, Florida (File No. BPH-850828KQ), and that he will divest this interest should his instant application for Silver Springs be granted. A condition reflecting this commitment will be specified below.

7. *Other matters*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Trax	February 5, 1988
Johnson	December 11, 1987

8. In response to Section VI, FCC Form 301, the applicants below have indicated that they will each employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rule as set forth in FCC Form 396A, the five-point Model EEO Program. The following applicants have submitted EEO programs that are incomplete or otherwise deficient.[4] Accordingly, the following applicants will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANTS	DEFICIENCIES
Limited	Failed to identify specific sources of recruitment specializing in women candidates.
Sun	Failed to identify specific sources of recruitment specializing in minority candidates.

9. Since no determination has been received from the FAA as to whether the antennas proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA will be made a party to the proceeding.

APPLICANTS: Trax, Partners.

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the following applicants would constitute a hazard to air navigation: Trax, Partners.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Bianco IS HEREBY DENIED and her application IS HEREBY DISMISSED.

14. IT IS FURTHER ORDERED, That in the event of a grant of Partners' application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein, permittee shall certify to the Commission that Robert A. Bednarek has divested his ownership interest in Gator Broadcasting, Ltd., permittee of WGBZ(TV), Gainesville, Florida.

15. IT IS FURTHER ORDERED, That in the event of a grant of Johnson's application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the station authorized herein, permittee shall certify to the Commission that he has divested his ownership interest in West Florida Television, Limited, a limited partnership, applicant for a new television station at Inverness, Florida.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated in paragraph 7 hereinabove: Trax, Johnson.

17. IT IS FURTHER ORDERED, That in accordance with paragraph 8 hereinabove, the following applicants shall submit to the presiding Administrative Law Judge amendments to their EEO programs within 30 days of the release of this Order: Limited, Sun.

18. IT IS FURTHER ORDERED, That the FAA IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **April 29, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of Interlace Communications, Inc. (File No. BPH- 870626MW) was dismissed on February 17, 1988, pursuant to the applicant's request.

[2] Johnson filed an opposition to Bianco's petition for reconsideration on January 26, 1988. Title 47 C.F.R. § 1.106(g), however, provides only a ten day period in which such oppositions may be filed. Accordingly, Johnson's opposition was untimely filed and thus will not be considered.

[3] In order to better utilize the Bureau's limited processing staff resources, the Commission has approved staff consideration and disposition of tenderability and acceptability matters in the context of the relevant hearing designation order rather than in a separate action document. *See Teton Broadcasting*, 1 FCC Rcd 518 (1986). *See also* 47 C.F.R. § 1.106(a)(1).

[4] In the event that an applicant listed an organization in its EEO program as a recruitment source which is unfamiliar to the staff but which would satisfy the EEO requirements, the applicant may amend its EEO program to describe that organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-122

In re Applications of

ROY DAVIS (hereafter: Davis) — File No. BPH-870612MA

JOHN H. TOTTEN, SR. AND JENNIE L. TOTTEN (hereafter: Totten) — File No. BPH-870612MD

MICHAEL J. BENNS (hereafter: Benns) — File No. BPH-870615MB

Leonard & Diana Scott d/b/a HIGHLAND BROADCASTING PARTNERSHIP (hereafter: Highland) — File No. BPH-870615ME

VIRGINIA ANN SATTLER (hereafter: Sattler) — File No. BPH-870615MM

Rebecca Ann Fulton & Kathleen D. Walker d/b/a REBECCA RADIO OF EAST RIDGE (hereafter: Rebecca) — File No. BPH-870615MU

EAST RIDGE FM LIMITED PARTNERSHIP (hereafter: FM/LTD) — File No. BPH-870615MY

For Construction Permit
for a New FM Station
on Channel 300A
in East Ridge, Tennessee

HEARING DESIGNATION ORDER

Adopted: March 11, 1988; Released: April 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *FM/LTD.* PFM/LTD has indicated that, in the event of a grant of the construction permit, Bradford D. Card will sever all connections with station WMBW(FM), Chattanooga, Tennessee. Accordingly, an appropriate condition will be specified.

3. *EEO.* Where applicants for a new broadcast station propose to employ five or more full-time employees, 47 C.F.R. § 73.2080 requires those applicants to submit Equal Employment Opportunity (EEO) Programs with their applications. Section VI of FCC Form 301 specifies the use of a five-point format set out in FCC Form 396A. In their applications, Davis, Benns and Highland state that they will employ five or more full-time employees. However, while each has submitted an EEO program, all of the noted applicants, to the extent indicated below, have failed to include, within Part IV, adequate examples of: a) minority and women's organizations, b) employment services, c) educational institutions, or d) publications which will be used to effectuate the EEO programs.[2] Accordingly, these applicants will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

APPLICANT	DEFICIENCIES
Davis	a,b
Benns	b,d
Highland	a,b,c,d

4. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENTS
Benns	October 6, 1987; December 3, 1987

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANTS:	Benns, FM/LTD

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Benns, FM/LTD

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That, in the event of a grant of FM/LTD's application, Bradford T. Card shall sever all connections with WMBW (FM), Chattanooga, Tennessee prior to the commencement of program test authority.

10. IT IS FURTHER ORDERED, That applicants Davis, Benns, and Highland shall file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, that the petitions for leave to amend filed by the following applicant ARE GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Benns.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **April 29, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] In its application, FM/LTD indicated that it had filed an application for a new FM facility in Ringgold, Georgia, under the name Ringgold FM Limited Partnership (File No. BPH-870107MJ). The applicant further noted that such application was being dismissed at its request. Commission records reveal that request for such dismissal occurred on June 15, 1987, and that the Ringgold application was ultimately dismissed in a Hearing Designation Order released December 21, 1987. Because of the close proximity of East Ridge, Tennessee to Ringgold, Georgia, grant of both applications would violate the Commission's Duopoly rule, 47 C.F.R. § 73.3555(a)(2). Thus, at the time it was filed, the East Ridge application constituted an inconsistent application under 47 C.F.R. § 73.3518, which would ordinarily necessitate its dismissal as the later-filed application. However, "[such] an inconsistent application will not be dismissed when, at the time of filing, the applicant makes the unequivocal statement that its earlier filed application is being or will be dismissed in the near future." *See In re application of WGSM Radio,* Inc., DA 87-985, released August 3, 1987 (Chief, Audio Services Division), citing Harold J. Haley d/b/a/ Madison County Broadcasting Co., 2 FCC Rcd 40 (1987).

[2] In the event that an applicant listed an organization in its EEO program as a recruitment source which is unfamiliar to the staff but which would satisfy the EEO requirements, the applicant may amend its EEO program to describe that organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-133

In re Applications of

Linda F. Turner, d/b/a TURNER BROADCASTING & COMMUNICATIONS SYSTEM — File No. BPCT-861222KM

William J. Kimble, *et al.*, d/b/a MARQUETTE TELEVISION ASSOCIATES — File No. BPCT-870326KU

John J. Garofalo, d/b/a SKYWAY TELEVISION, LTD. — File No. BPCT-870331LB

UPPER PENINSULA TELECASTING CORP. — File No. BPCT-870331LY

For Construction Permit
Marquette, Michigan

HEARING DESIGNATION ORDER

Adopted: February 29, 1988; Released: April 8, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for a new commercial television station to operate on Channel 19, Marquette, Michigan.

2. Section II, Item 8(b), FCC Form 301, inquires if any member of the immediate family of the applicant has any interest in or connection with any other broadcast station or pending broadcast application. Linda Turner (Turner) has responded "not applicable." The question requires a "yes" or "no" response. Turner will be required to submit an amendment with the proper response to Section II, Item 8(b) to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. It appears that Turner's antenna height calculations are inaccurate in that the height above average terrain (HAAT) calculations submitted in her May 8, 1987 amendment do not agree with the HAAT in Section V-C, Item 6 of the application. In addition, a significant portion of the Grade B area is not shown on the contour map. Accordingly, Turner will be required to amend her application to provide corrected data to agree with the HAAT in Section V-C, Item 6 and a new, complete, and accurate contour map and area and population figures. Also, John Garofalo's contour maps show contours that do not reflect the contour calculations given in Section V-C, Item 15. Mr. Garofalo will be required to amend his application to provide corrected data in Section V-C, Item 15 (tabulation of terrain data), new contour maps, and area and population figures. These amendments must be submitted to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. None of the applicants, except William J. Kimble, have submitted such an exhibit. Accordingly, the designated applicants will be required to file the appropriate exhibit with the presiding Administrative Law Judge within 30 days after this Order is released.

5. William Kimble proposes to operate from a site located within 400 km of the Canadian border with maximum visual effective radiated power (ERP) of more than 1000 kilowatts. The proposal poses no interference threat to United States television stations; however, it contravenes an agreement between the United States and Canada, which limits the maximum visual ERP of United States television stations located within 400 km of Canada to 1000 kilowatts. *Agreement Effectuated by Exchange of Notes*, T.I.A.S. 2594 (1952). William Kimble has requested a waiver of the power limitation under the United States-Canada Agreement, but because this limitation is imposed by international agreement, the Commission is without authority to waive unilaterally the limitation. Accordingly, the waiver request will be denied. In the event of a grant of his application, the construction permit shall contain a condition precluding station operation with maximum visual ERP in excess of 1000 kilowatts, absent Canadian consent. *South Bend Tribune*, 8 R.R. 2d 416 (1966).

6. No determination has been made that the tower height and location proposed by each applicant, except Ms. Turner, would not each constitute a hazard to air navigation. Accordingly, an appropriate issue will be designated.

7. The coverage area proposed by the applicants differ significantly. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue, for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to each of the applicants, except Linda F. Turner, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

10. IT IS FURTHER ORDERED, That Linda Turner shall submit an amendment with the proper response to Section II, Item 8(b) to the presiding Administrative Law Judge, within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That Linda Turner, John J. Garofalo, and Upper Peninsula Telecasting shall submit their responses to Section IV, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

12. IT IS FURTHER ORDERED, That Linda Turner shall submit an amendment with respect to the height calculations, as set out in paragraph 3, *supra*, and a new, complete and accurate map and area and population figures to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That John Garofalo shall submit an amendment with respect to the terrain data, new contour maps, and area and population figures, as set out in paragraph 3, *supra*, to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That William Kimble's waiver request IS DENIED.

15. IT IS FURTHER ORDERED, That in the event of a grant of William Kimble's application, the construction permit shall be conditioned as follows:

Subject to the condition that operation with visual effective radiated power in excess of 1000 kw is subject to the consent of Canada.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

17. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-115

In re Applications of

FAMILY STATIONS, INC. (hereafter Family) — File No. BPED-850613MA

CHRISTIAN COMMUNICATIONS, INC. (hereafter Christian) — File No. BPED-860512MK

For a Construction Permit for a New noncommercial FM Station on Channel 219A, Youngstown, Ohio

HEARING DESIGNATION ORDER

Adopted: March 7, 1988; Released: April 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial FM station.

2. Neither applicant has indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Grandfalloon Denver Educational Broadcasting, Inc.*, 43 FR 49560, published October 24, 1978. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement themselves.

3. Inasmuch as this proceeding involves competing applicants for noncommercial educational facilities, the area and populations aspect of the standard comparative issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

4. The applicant below have petitioned for leave to amend their applications after the last date for filing amendments as of right. These amendments report significant changes in information previously furnished to the Commission and, pursuant to 47 C.F.R. § 1.65, are accepted for filing. However, the applicants may not improve their comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from these amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Christian	August 20, 1987 (Engineering)

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and if so, the terms and conditions thereof: (b) the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments IS ACCEPTED to the extent indicated herein: Christian

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **April 29, 1988**, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-117

In re Applications of

ERNEST C. MILLER File No. BPH-860115MK
(hereafter Miller)

CHARLES J. SALTZMAN File No. BPH-860121MT
(hereafter Saltzman)

Jane A. Filler d/b/a File No. BPH-860123MV
WAUSEON RADIO
(hereafter Filler)

DAVID EDWARD KNISELY File No. BPH-860123MW
(hereafter Knisely)

ROGER SCHINDLER *et al.* d/b/a

FULTON BROADCASTERS File No. BPH-860123NS
(hereafter Fulton)

For a Construction Permit for a
New FM Station on
Channel 245A, Wauseon, Ohio

HEARING DESIGNATION ORDER

Adopted: March 8, 1988; Released: April 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Fulton*. Fulton has indicated that its proposed operation will require the hiring of a staff of more than five persons. Accordingly, pursuant to 47 C.F.R. § 73.2080(c), it submitted a Model Equal Employment Opportunity Program. However, it has not filled out completely certain essential sections of its Program. Specifically, it has failed to state the names of any publications in which it plans to place advertisements for the purpose of recruiting; failed to identify any employment referral services which refer job candidates without regard to race, color, religion, national origin, or gender; failed to identify specifically any high school or college with significant minority and female enrollments; and failed to state the nature of the assistance it will provide to students, schools, or colleges in order to enable women and minorities to compete in the broadcast market on an equitable basis. Based on these omissions, we find that Fulton has not complied with the requirements of the stated rule. Accordingly an appropriate amendment will be required.

3. Although Fulton has submitted in its application a "Site Availability Certification", its certification does not fully comply with the requirements contained in paragraph 22 and in Appendix D of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985) (*Report and Order*). In the *Report and Order*, the Commission established a requirement that all applicants certify that "reasonable assurance has been obtained from the property owner that the site will be available". The new provision was incorporated into the processing requirements called for on FCC Form 301. However, the Commission made provisions for applicants, "[i]n the interim, before the changed Form 301 is available: [a]pplicants should attach such certifications to the old form." Appendix B was affixed to the *Report and Order* as a sample site certification form. All required information was contained in Appendix B. Specifically, each applicant must provide, in addition to the name and telephone number of the person contacted, a statement of whether that person is the owner of the site or that owner's agent.

4. Fulton, however, neither submitted the Appendix B certification with its application, nor subsequently amended its application in order to fully comply with the certification requirement. Fulton's certification contains only the name and telephone number of the person contacted. Accordingly, an appropriate amendment will be required.

5. Fulton has proposed to sidemount its antenna on an existing tower. Fulton has stated in Section V-B and V-G of its application that the coordinates of its proposed tower are 41-33-37/84-08-51. Staff review of the Commission's data base has confirmed the location of this tower. However, examination of the transmitter site map reveals slight discrepancies between the plotted coordinates and those correctly listed in Sections V-B and V-G. Engineering analysis shows the following coordinates on Fulton's site map: 41-33-41/84-08-54. It appears that Fulton may have incorrectly plotted the actual existing location. Accordingly, Fulton will be required to submit a corrective amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. The applicant below has petitioned for leave to amend her application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENTS FILED
Filler	November 30, 1987

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Saltzman have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Saltzman would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Saltzman

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge: Fulton.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Fulton shall file with the presiding Administrative Law Judge an amended site certification pursuant to paragraphs 4 and 5.

13. IT IS FURTHER ORDERED, That Fulton shall file an appropriate amendment to its transmitter site map with its proposed tower correctly plotted to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, that the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Filler, November 30, 1987.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration is MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **April 29, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-116

In re Applications of

LEONARD JAMES GIACONE (hereafter Giacone)	File No. BPH-851210ME
H & I BROADCASTING, LTD. (hereafter H & I)	File No. BPH-851216ME
BOBBY BISHOP (hereafter Bishop)	File No. BPH-851216NH
CLEARWATER COMPANY (hereafter Clearwater)	File No. BPH-851216NI
JULIE N. FREW (hereafter Frew)	File No. BPH-851216NJ
VICKSBURG FM GROUP LIMITED PARTNERSHIP (hereafter Vicksburg FM)	File No. BPH-851216NK
RADIO VICKSBURG, LTD. (hereafter Radio Vicksburg)	File No. BPH-851216NG (Previously Dismissed)
VICKSBURG BROADCASTING FOUNDATION (hereafter Vicksburg Broadcasting)	File No. BPH-851216NL (Previously Dismissed)

For a Construction Permit
for a New FM Station on Channel 266A
Vicksburg, Mississippi

HEARING DESIGNATION ORDER

Adopted: March 8, 1988; Released: April 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On December 16, 1985, applicants Vicksburg Broadcasting and Radio Vicksburg tendered applications to serve Vicksburg, Mississippi on Channel 266A. Both applications were accepted for tender on January 6, 1986, but both were returned on February 12, 1987 as unacceptable for filing due to violations of the spacing requirements found in 47 C.F.R. § 73.207 and the *Memorandum Opinion and Order* in BC Docket 80-90, 97 FCC 2d 279, 283 (1984). Both applicants proposed sites short-spaced to the buffer-zone protection accorded to WDMS-FM, Greenville, Mississippi, operating at Channel 264C. Furthermore, both failed to file timely waiver requests, pursuant to 47 C.F.R. § 73.3566(a), with their original applications. On March 20, 1987, the two applicants filed timely Petitions For Reconsideration after the return of their respective applications. Their Petitions For Reconsideration herein will be denied.

3. In its *Memorandum Opinion and Order*, *supra*, the Commission provided (until March 1, 1987) existing Class C stations operating with an antenna height above average terrain (HAAT) of less than 300 meters an additional 16 kilometers of spacing protection. As it reminded applicants in its *Public Notice* released April 19, 1985 entitled "Spacing Requirements in Effect until March 1, 1987, pursuant to BC Docket 80-90", 51 Fed. Reg. 26010 (July 18, 1986), "all commercial applications for FM allotments adopted on or after March 1, 1984 must meet the minimum distance separation requirements specified in § 73.207 plus an additional 16 kilometers to existing Class C stations with the buffer zone." The allotment to Channel 266A was adopted after March 1, 1984. The second adjacent Class A to Class C minimum distance separation requirement is 121 kilometers, which includes the required 16-kilometer buffer zone. Thus, as applicants for Channel 266A, Vicksburg Broadcasting and Radio Vicksburg were responsible for proposing antenna sites at a minimum of 121 kilometers from the licensed facilities of WDMS-FM. Vicksburg Broadcasting's proposed site is 119.7 kilometers, and Radio Vicksburg's is 119.2 kilometers from WDSM's licensed Class C site.

4. Pursuant to 47 C.F.R. § 73.3566(a), applications determined to be patently not in accordance with the Commission's rules, unless accompanied by an appropriate waiver request, will not be accepted for filing, or will be dismissed if inadvertently accepted for filing. As specified in paragraph 32 of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), applications so returned may not be resubmitted with a curative amendment to regain *nunc pro tunc* status, since applicants were afforded 30 days after the release of the notice of tenderability to amend their applications into acceptable form. Petitions for reconsideration of such returns must, pursuant to 47 C.F.R. § 1.106(d)(2), cite "findings of fact and/or conclusions of law" believed to be erroneous in the determination of unacceptability. Under these rules, an application with a short-spaced site clearly cannot be reinstated and found acceptable when there has been no request for a waiver nor any Commission error.

5. At issue, then, is whether Vicksburg Broadcasting and Radio Vicksburg comply with the above-noted requirements governing short-spacing and the protection of buffer-zones. Both applicants concede that they had proposed antenna sites which were short-spaced to the buffer zone when tendered and remained so throughout the appropriate amendment period. Each applicant attempts to circumvent this deficiency through arguments advanced in its Petition For Reconsideration.

6. Vicksburg Broadcasting based its Petition on the Commission's decision in *Donovan Burke*, 104 FCC 2d 843, (1986). Petitioner interpreted that decision to automatically entitle an applicant whose application was returned, but who timely filed a Petition For Reconsideration, to an additional post-return 30-day cura-

tive amendment period regardless of whether the applicant submitted a proper waiver request with its original application. Vicksburg Broadcasting's interpretation is mistaken. *Donovan Burke* specifically stated that "Per 73.3566(a), only where accompanied by a request for waiver can a short-spaced application be acceptable for filing. Absence of such a request results in the application's return as unacceptable for filing." *Donovan Burke*, 104 FCC 2d at 845 n.2.

7. This policy is consistent with the admonition contained in the Commission's July 27, 1984 *Public Notice* of its "Future Policy on Incomplete and Patently Defective Applications," 49 Fed Reg. 47331, *recon. denied* 57 RR 2d 1603 (1985), namely that applications failing to comply with core technical acceptence criteria will, absent an appropriate waiver request, be returned as unacceptable for filing. The Commission must dismiss those applications which do not meet the requirements specified in our administrative rules. Moreover, since the release of *Donovan Burke*, the Commission has made no change in this policy; see *Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, 521 n.5 (1986); *Stevens Point Communications Corporation*, 2 FCC Rcd 1747, 1748 (1987).

8. Vicksburg Broadcasting and Radio Vicksburg both contend that they should no longer be considered short-spaced because at the expiration of the three-year protection period established by the *Memorandum Opinion and Order*, *supra*, WDMS-FM had not attempted to upgrade its facilities, and therefore, in retrospect, had not been actually harmed by the proposed antenna location of either applicant. This argument is in error because it assumes that March 1, 1987, the expiration date for buffer-zone protection, was the operative date to determine whether WDMS was entitled to buffer zone protection. To the contrary, the *Memorandum Opinion and Order* conferred the protection of the buffer zone prospectively, to run continuously from March 1, 1984 until March 1, 1987. *See* 97 FCC 2d at 285. Therefore, the date on which Vicksburg Broadcasting and Radio Vicksburg filed their short-spaced applications was the point in time at which these applicants were obliged to recognize the buffer zone of protection entitled to WDMS. To decide otherwise would be to impose on WDMS the burden of ascertaining, as of the date of the filed applications, all of the future possibilities it might pursue in order to upgrade.

9. Accordingly, for the reasons stated herein, the Petitions For Reconsideration of Vicksburg Broadcasting and Radio Vicksburg will be denied.

10. *Giacone*. On August 21, 1987, Giacone filed a Petition For Leave To Amend requesting permission to specify a new transmitter site. In support of his contention that there is sufficient good cause warranting a grant of his Petition, Giacone alleges that the owner of the original site had sold a portion of the total site to a second owner. Giacone further alleges that the second owner did not wish to have a tower located on the remaining portion of the site. Since Giacone has reported neither the date of his loss of the original site, nor that of his acquisition of the second, it is impossible to determine whether Giacone acted with diligence after the loss of his originally proposed site. Thus Giacone has failed to demonstrate good cause for the acceptance of his amendment which was filed subsequent to the amendment as of right period. *See* paragraph 31 of the *Report and Order* in MM Docket 84-750, *supra*. Accordingly, the petition will be denied and the amendment will be returned. In light of the action taken herein, a site availability issue will be added.

11. *Bishop*. Engineering study of the Bishop application has revealed noncompliance with ANSI C95.1-1982 guidelines for human exposure to radio frequency radiation as outlined in OST Bulletin No. 65 (October, 1985). Consequently, we are concerned in this instance that Bishop may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in Docket No. 79-163, 51 Fed. Reg. 14999 (1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the applicant is subject to environmental processing under the Section 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. Section 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. Since the proposal of Bishop may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, he is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Bishop will be required to file within 30 days of the release of this Order an Environmental Assessment to the presiding Administrative Law Judge.[1] In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied* sub nom. *Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

12. Bishop responded to Section II, Item 6(a) of his application by submitting an Exhibit I that indicates that he is "employed in sales for KYBO(FM), Tallulah, Louisiana." Bishop's Exhibit, however, fails to specify in what capacity he is employed at KYBO(FM). KYBO(FM) is located in sufficiently close geographic proximity to Bishop's proposed operation to establish that Bishop's employment represents a potential violation of the Commission's cross-interest policy. *See , e. g. Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-2 (1970). Consequently, Bishop will be required to file an amendment with the presiding Administrative Law Judge, within 30 days of the release of this Order, providing a job description and detailing his position at KYBO(FM). Upon evaluation of the requested amendment, the Judge will then determine whether a potential violation of the cross-interest policy exists.

13. *Vicksburg FM*. Vicksburg FM specified in its application that it is a limited partnership consisting of two general partners, Mr. Hughes and Dr. Shirley, and two limited partners, United Communications, Inc. and a "Trust--to be established". One limited partner, United Communications, Inc., is involved with at least one other application for new FM facilities. However, Vicksburg FM failed to provide an insulation statement wholly satisfying the requirements of the Commission's *Attribution Reconsideration Order*, 58 RR 2d 604, 618 (1985).[2] In order to determine its application's compliance with the Commission's multiple ownership rules and cross-interest policy, Vicksburg FM will be required to file an amendment with

the presiding Administrative Law Judge within 30 days of the release of this Order disclosing all media interests of its limited partners.

14. *Other Matters.* The applicant below has petitioned for leave to amend his application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENTS FILED
Giacone	August 26, 1987

15. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Giacone has reasonable assurance that the transmitter site specified will be available to him.

2. If a final environmental impact statement is issued with respect to Bishop in which it is concluded that the proposed facilities are likely to have an adverse effect on the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That the Petitions For Reconsideration filed by Vicksburg Broadcasting and Vicksburg Radio are DENIED.

19. IT IS FURTHER ORDERED, That the Petition For Leave To Amend filed by Giacone on August 21, 1987 IS DENIED, and the amendment IS RETURNED.

20. IT IS FURTHER ORDERED, That in accordance with paragraph 11 hereinabove, Bishop shall submit an environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

21. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Bishop shall file, pursuant to paragraph 12 hereinabove, an amendment with the presiding Administrative Law Judge specifying his position with KYBO(FM), with an accompanying job description.

22. IT IS FURTHER ORDERED, That Vicksburg FM shall file, within 30 days of the release of this Order, an amendment with the Administrative Law Judge which provides the information specified in paragraph 13 hereinabove.

23. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Giacone, August 26,1987.

24. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

25. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **April 29, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] This study must also include calculations of exposure levels measured at the base of the tower which account for the cumulative effect of the proposed facilities in conjunction with all other broadcast facilities and construction permits sharing the proposed tower.

[2] In order for the limited partners to be exempt from attribution under the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, the applicant must certify that its limited partners will refrain from involvement in any material respect in the manage-

ment or operation of the proposed station and, further, that no limited partner has any interest or connection of any nature with any broadcast station or other medium of mass communication operating within the service area of the proposed station that is or might be inconsistent with the Commission's cross-interest policy under the *Attribution Reconsideration* Order, 58 RR 2d 604, 618, (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-121

In re Applications of

David and Joyce Goff d/b/a CELINA BROADCASTING (hereafter CB) File No. BPH-861217MB

John W. & Linda Hembree *et al.* d/b/a CLAY COUNTY BROADCASTING (hereafter Clay) File No. BPH-861217MC

GARY L. WELLS (hereafter Wells) File No. BPH-861217NH

For a Construction Permit for a New FM Station on Channel 229A (93.7 MHz) at Celina, Tennessee

HEARING DESIGNATION ORDER

Adopted: March 7, 1988; Released: April 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services, Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **April 29, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-113

In re applications of

Robert L. Dean & Charles Thomas, Sr., d/b/a/ DEAN - THOMAS COMMUNICATIONS (hereafter Dean-Thomas)	File No. BPH-860312MR
MOUNTAIN TOWER (hereafter Mountain)	File No. BPH-860313MT
RONALD L. WILSON (hereafter Wilson)	File No. BPH-860317ND
ROBERT A. JONES (hereafter Jones)	File No. BPH-860317NG
COLLEGE TOWN RADIO LIMITED PARTNERSHIP (hereafter College)	File No. BPH-860317NH
Emmett M. Capper d/b/a BRIDGEWATER BROADCASTERS (hereafter Capper)	File No. BPH-860317NI
KIRKLEY PAIGE BEAL (hereafter Beal)	File No. BPH-860317NK
JUDITH L. RANDOLPH AND GENESIS COMMUNICATIONS, INC. (hereafter Randolph/Genesis)	File No. BPH-860317NF (DISMISSED HEREIN)

For a Construction Permit for a
New FM Station on Channel 286A
in Bridgewater, Virginia

HEARING DESIGNATION ORDER

Adopted: March 8, 1988; Released: April 8, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On January 2, 1986, Genesis Communications, Inc., a general partner in Randolph/Genesis, filed an application for a new FM station to serve Ruckersville, Virginia. This application was returned as untenderable on January 10, 1986; a petition for reconsideration was filed on January 22, 1986.

3. On March 17, 1986, during the pendancy of the Ruckersville petition, Genesis also filed the instant application to serve Bridgewater Virginia. An engineering study has shown that grant of both the Ruckersville and Bridgewater applications would result in severe overlap of the 1 mV/m contour of the two stations in violation of the Commission's duopoly rule, found at 47 C.F.R. § 73.3555(a)(2).

4. Because Genesis submitted its Bridgewater application *after* the return of its Ruckersville application, we note that the Bridgewater application, at least initially, was properly filed. However, on August 7, 1987, the Ruckersville petition for reconsideration was granted and that application, originally filed January 2, 1986, was reinstated *nunc pro tunc*.

5. Consequently, as of August 7, 1987, the point at which both the Ruckersville and Bridgewater applications were pending simultaneously, the Bridgewater application became patently defective as the later-filed of two conflicting applications. Accordingly, and pursuant to 47 C.F.R. § 73.3518, the application submitted by Genesis must be dismissed.[1]

6. *Jones.* Exhibit No. 1 to Jones' application entitled "Broadcast Background and Experience" indicates that Jones is currently employed in "various capacities" at WQPO(FM), Harrisonburg, Virginia; WABH(AM), Churchville, Virginia; WHBG(AM), Harrisonburg, Virginia, and WSVA(AM) Harrisonburg, Virginia. Because Churchville, Harrisonburg and Bridgewater are located within a 26 mile radius of each other, Jones' activities at these stations must be disclosed and evaluated in light of the Commission's duopoly rule, found at 47 C.F.R. § 73.3555(a), and cross-interest policy . Accordingly, Jones must file an amendment with the presiding Administrative Law Judge fully describing the nature of his employment at WQPO(FM), WABH(AM), WHBG(AM) and WSVA(AM).

7. *Capper.* Capper proposes to use the WHBG(AM) tower to support its antenna. However, its proposal specifies coordinates of 38' 24' 31" NL, 78' 54' 03" WL, while the coordinates presently authorized to WHBG are: 38' 24' 30" WL, 78' 54' 04" WL. Capper has offered no explanation for this discrepancy. Neither spacing nor coverage are affected by this discrepancy; nonetheless, Capper must file an amendment to conform its coordinates with those specified by WHBG, or alternatively, provide an adequate explanation for the deviation. An air hazard issue will also be specified against Capper.

8. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Dean-Thomas	May 9, 1986
	July 17, 1986
Jones	June 3, 1986 (engr.)

College	May 15, 1987
Beal	May 21, 1986
	August 21, 1986
	October 3, 1986

9. Data submitted by the applicants indicate that there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by Wilson, Capper and Beal would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Wilson, Capper and Beal would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the application filed by Genesis IS HEREBY DISMISSED.

14. IT IS FURTHER ORDERED, That Jones shall file an amendment with the presiding Administrative Law Judge fully describing his employment at WQPO(FM), WABH(AM), WHBG(AM), and WSVA(AM) within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That Capper shall file an amendment with the presiding Administrative Law Judge conformimg its geographic coordinates with those specified by WHBG(AM) Harrisonburg, Virginia or, alternatively, submit a justification for its use of the coordinates proposed, within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order,not later than **April 29, 1988** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] *See Big* Wyoming Broadcasting Corp., 2 FCC Rcd 3493 (1987); *see also WGSM" Radio, Inc., (Mass Media Bureau) 2 FCC Rcd 4565 (1987).*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TERRY L. HOLLOMAN — File No. 77716-CL-P-250-A-86

For authority to construct
a system on frequency Block A
in the Cellular Radio
Telephone Service in
Bloomington-Normal, Illinois

ORDER ON RECONSIDERATION

Adopted: March 18, 1988; Released: April 8, 1988

By the Chief, Mobile Services Division:

1. Before us are a Request for Waiver of our microfiche rule and a Petition for Reconsideration of our dismissal of the above-captioned application. Terry L. Holloman's (Holloman) application[1] was dismissed by Public Notice Report No. CL-87-173, February 13, 1987, for failure to file two complete microfiche copies of the application. Holloman's microfiche copies did not contain sixteen pages of the engineering information for her three proposed cell sites. Holloman's Petition argues that her application was improperly dismissed, and in her waiver request Holloman asks that the microfiche rule be waived and that amended microfiche copies be accepted.

2. Holloman argues that dismissal of her application violates Sections 553(b) and 553(d) of the Administrative Procedure Act because the Commission has improperly changed its acceptance standards regarding applications filed with defective copies. Holloman charges that the standard for "defectively produced" applications is defined in *Petitions For Reconsideration of the Return of Round IV Cellular Applications*, 103 F.C.C. 2d 171, 176-177 (1986)(Round IV Reconsideration Order).[2] In that case the Commission reinstated an application because the CGSA extension depicted on the original copy of the map (but not on duplicate copies of the map) "is demonstrated to be a mistake both through reference to the defective map itself and through reference to the other copies of the map already on file at the Commission." *Id.* at 177. Holloman argues that the deletion of her engineering exhibit from the microfiche copies of her application can also be demonstrated to be a mistake in production through reference to other copies of her application. Holloman argues that the established standard for "defectively produced" applications calls for other copies of the application to be used as reference, rather than to dismiss the entire application, and argues that she has the right to be treated according to this standard.

3. Holloman maintains that dismissal of applications with incomplete microfiche copies was not contemplated in any Rule Making proceeding, and that "[t]he rule regarding the dismissal of incomplete microfiche copies is a substantive rule requiring notice and comment as mandated by the APA." *Petition* at 4. Holloman argues that the Commission established its acceptability standard for microfiche copies by Public Notice released March 11, 1986. The Public Notice stated, *inter alia*, that "[a]ny application not containing *two complete* microfiche copies *will be rejected.* " (Emphasis in original). Holloman argues that the dismissal aspect of the rule articulated in the Public Notice illegally changed the pre-existing Commission standard regarding defective copies of applications.

4. Holloman also argues that the microfiche rule is arbitrary and capricious, and that this position is substantiated by *Werner, Burton K.*, 2 FCC Rcd 1484 (1987) (*Werner*). In *Werner*, the first two pages of the application's ownership exhibit were superimposed on one microfiche page. Holloman argues that the Commission cannot legitimately distinguish "between a microfiche copy with material so faint that the processing staff couldn't see it during its initial review, and microfiche with material missing." *Petition* at 8. Holloman argues that the arbitrary and capricious nature of the microfiche rule is further exhibited by the absence of Commission case precedent holding that failure to submit a substantially complete paper copy of an application will result in its dismissal. Holloman relies on *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235 (D.C. Cir. 1985) [3] for the proposition that similar cases must be treated similarly, and on *Caldwell Television Associates, Ltd.*, 53 Rad. Reg. 2d (P & F) 1686 (1983),[4] for the point that consistent, reasoned decisionmaking will not permit a distinction between delay caused by weather and delay caused by duplicating machine breakdown.

5. Finally, Holloman argues that the microfiche copies are not intended for use by the Commission staff, and that their only purpose is for review by the public. Holloman notes that in *Werner*, the Bureau acknowledges that any questions the reviewer had as to the omitted ownership material could be answered by reference to a paper copy of the application on file with the Commission's copying contractor. Holloman argues that it is unreasonable to dismiss her application when the omitted engineering information is likewise available.

DISCUSSION

Petition For Reconsideration

6. In *Cellular Lotteries (Further Reconsideration)*, 59 Rad. Reg. 2d (P & F) 407, 410 and note 16 (1985) (hereinafter "Further Reconsideration Order"), a Rule Making proceeding conducted in accordance with APA requirements, the Commission established the rule that two microfiche copies of each application must be submitted at the time of filing.[5] Failure to do so, the Commission indicated, "will result in the application being returned as unacceptable for filing." The March 11, 1986 Public Notice simply emphasized our microfiche requirements for the convenience of the public. Accordingly, Holloman is incorrect that the public notice *established* a new standard for acceptability of microfiche copies. It is clear that the microfiche rule, including its provision for dismissal of applications filed with incomplete microfiche copies, was promulgated in accordance with APA standards.

7. Likewise, the microfiche rule is not arbitrary and capricious. The *Further Reconsideration Order* fully discussed the Commission's reasons for its requirements for

cellular applications. There is a large number of potential cellular applicants who need information regarding existing applicants and tentative selectees. Microfiche copies are necessary to meet this need. In addition, the staff uses microfiche copies of applications as well as the paper copies because more than one staff member reviews each application; thus, a single paper copy is not sufficient. Microfiche copies of applications play an important role both in staff processing and in meeting our responsibility to make applications available for public review.

8. The *Werner* case does not support Holloman's position. The Bureau saw two separate issues in the *Werner* fact situation: first, whether any information in the application was actually omitted from the microfiche copy, and second, whether the letter-perfect standard applied to microfiche copies. The Bureau found that no information in the application was left out, since the second page of the ownership exhibit appeared. Furthermore, the letter-perfect rule does not apply to the contents of microfiche copies, so the illegibility of some ownership information did not disqualify the application. Therefore, the application was reaccepted.

9. The facts of the *Werner* case do not match those of Holloman's situation, because material was omitted from Holloman's microfiche copy.[6] In fact, sixteen pages of the heart of the application were missing, i.e., the engineering section, which is the information most needed by our processing staff and the public to evaluate any application. All but one page of Holloman's three Form 401 Schedules B were omitted from both microfiche copies. Under the circumstances, it is clear that Holloman has not provided microfiche copies of her application as required by Section 22.913(c) of the Commission's Rules.

10. Section 22.913(b)(3) of the Commission's Rules requires that each applicant for an initial authorization include a certification stating that all information required by Form 401 and the Commission's cellular application rules has been included in the application. Holloman executed the required certification in which she stated, *inter alia*, that all required information was included and that "if, upon Commission inspection, this certification is shown to be incorrect, this application shall be dismissed without further consideration." Because Holloman did not comply with Section 22.913(c), she has not met the standard which she herself acknowledged in the certification. Accordingly, Holloman's application is being dismissed without further consideration. Since Holloman's application is subject to dismissal "without further consideration," it follows that the application cannot be amended. Accordingly, we will not accept the amended microfiche copies included with Holloman's waiver request.[7]

WAIVER REQUEST

11. In her waiver request, Holloman asks that the microfiche rule be waived and that amended microfiche copies be accepted "to facilitate the processing of her application." Holloman incorporates her Petition for Reconsideration in support of her waiver request. Holloman's pertinent arguments within her reconsideration petition are that, because the microfiche copies are allegedly not used by the Commission for processing (see paragraphs 5, 8 and 9, *supra)* she is "being deprived of the opportunity to become a Commission licensee for submitting a defective microfiche copy," and that "it is completely unreasonable to dismiss an application for missing pages in the public's reference copy when there are two other sources for obtaining any missing information . . . ."

12. We deny Holloman's request. Holloman's proposed microfiche amendment will not be accepted pursuant to the discussion in paragraph 10, *supra*. With regard to Holloman's waiver request vis-a-vis the original application, Section 22.19 of the Commission's Rules specifies that one of two alternative showings must be made to justify a waiver. First, an applicant requesting a waiver may show "that the underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest." Or, an applicant may show "that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest.".

13. As discussed *supra*, Holloman's certification acknowledges that her application is subject to immediate dismissal for failure to comply with all the Commission's cellular application rules, which includes the microfiche rule. Even assuming, *arguendo*, the absence of a certification requirement, Holloman has not justified a waiver of the microfiche rule. The underlying purpose of the microfiche rule, as discussed *supra*, is to provide the public and Commission with an adequate number of working copies of applications. Copies of the engineering portion of the application are particularly important both to Commission staff and the general public. Holloman has not shown that this purpose will be frustrated if we do not accept her application. Nor has Holloman shown that enforcement of this rule would be inequitable due to unique facts and circumstances. Accordingly, we find that Holloman has not made the required showings and we deny the waiver request.

14. Holloman has not requested a waiver of the certification rule. Thus, we are not called upon to consider whether such a waiver would be appropriate.

ORDERING CLAUSES

15. WHEREFORE, for the foregoing reasons, the Petition for Reconsideration and the Request for Waiver filed by Terry L. Holloman, File No. 77716-CL-P-250-A-86, IS DENIED.

16. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] By letter dated January 26, 1988, applicant's counsel notified the Commission of a change in applicant's name to Terry L. Reed. However, because the name on the application is Terry L. Holloman, this Order will use the original file name to avoid confusion.

[2] There, the Commission reconsidered the dismissal of the application of the Continental Telephone Company of New York, Inc. (Contel) for the Utica-Rome MSA. Contel's original map showed its proposed CGSA extending into an adjacent central MSA. Contel argued that the map was improperly aligned during the mechanical drafting process, and that correct depiction of its CGSA could be found in the duplicate maps provided with the application. Moreover, hairline marks intended to match latitude and longitude intersections on the original map were visible, showing on the face of the map that the CGSA depiction was improperly aligned.

[3] In *Green County*, an attorney with applications to file was denied access to the building either at or minutes after the 5:30 p.m. deadline. Nevertheless, a line of applicants, who had arrived prior to the 5:30 deadline, remained outside the Secretary's office and the office stayed open to permit filing by those applicants. The court reversed the dismissal, saying that the Commission invoked its filing deadline rule inconsistently, and that it had not treated similar cases similarly.

[4] In *Caldwell*, the court rejected a distinction between "the last minute failure of a copy machine" and the delay of an airplane by foggy weather.

[5] Section 22.913(c) is the codification of the Commission's microfiche rule.

[6] Dismissal of Holloman's application is in accord with other cellular decisions, *see Petitions for Reconsideration of the Return of Round IV Cellular Applications for Ommission* of Required Documents or Data, 103 F.C.C.2d 56 (1986). The cellular decision cited by Holloman, "Round IV Reconsideration Order" 103 F.C.C.2d at 176-177, does not apply to her fact situation. See note 2, supra. Contel's application included a clear map in proper scale and met the rule requirement that a map be filed depicting the CGSA and other information. An error on the map was allowed to be corrected by reference to other maps on file. On the other hand, an applicant who failed to include a map drawn to proper scale had its application dismissed. Likewise, Holloman's application is being dismissed because she failed to file two complete microfiche copies.

[7] In addition, we note that neither the original nor the proferred amended microfiche copy meets the requirements of Section 22.913(c) of the Commission's Rules to the extent that Holloman has omitted the information required to be printed on the paper jackets of the microfiche copies.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988— 201-708/80015